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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 329 83.

JOHN JOYCE, PLAINTIFF IN ERROR,

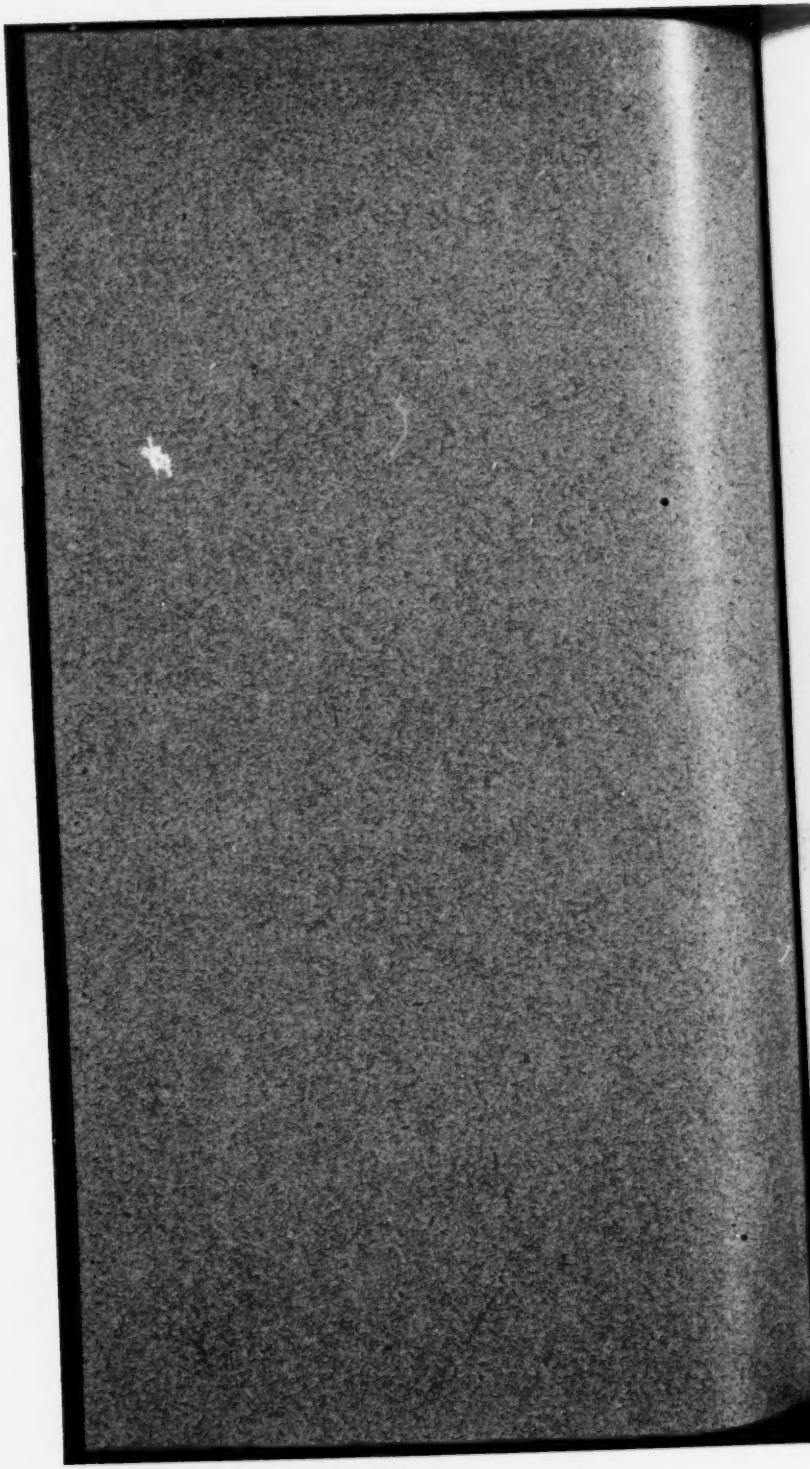
vs.

H. F. AUTEN, SUCCESSOR OF STERLING R. COCKRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF LITTLE ROCK, ARKANSAS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JUNE 22, 1899.

(17,443.)



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INDEX.

	Original.	Print.
Transcript from the circuit court of the United States for the southern district of Ohio	1	1
Petition	1	1
Waiver of summons and entry of appearance	3	3
Stipulation to correct record	3	3
Demurrer to petition	4	4
Stipulation to withdraw demurrer, &c	4	4
Stipulation as to time to answer	4	4
Order granting time to file answer	5	5
Answer	5	5
Demurrer to answer	9	9
Order sustaining demurrer to answer, &c	10	9
Order granting leave to file amended answer	10	10
Amended answer	10	10

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	Original.	Print
Demurrer to amended answer	15	14
Judgment	15	14
Petition for writ of error	16	15
Assignment of errors	17	16
Order allowing writ of error	17	16
Bond on writ of error	18	17
Clerk's certificate	19	18
Writ of error	19	18
Citation and service	20	19
Appearance for plaintiff in error	23	20
Consent to filing brief of defendant in error	23	21
Order beginning argument	24	21
Order concluding argument and submitting cause	24	21
Judgment	25	22
Opinion	26	22
Clerk's certificate	35	29
Petition for writ of error	36	30
Allowance of writ of error	38	31
Assignment of errors	40	31
Writ of error	43	32
Citation	44	33
Proof of service of citation	45	33
Bond on writ of error	46	33
Clerk's certificate	48	34
Stipulation to substitute H. F. Auten, receiver, as defendant in error	49	35

1 *Transcript of Record.*

At a stated term of the circuit court of the United States, within and for the sixth judicial circuit and eastern division of the southern district of Ohio, begun and held at the court-rooms in the city of Columbus, on the first Tuesday of December, being the seventh day of that month, in the year of our Lord one thousand eight hundred and ninety-seven, and in the one hundred and twenty-second year of the Independence of the United States of America—present, the Hon. William H. Taft, circuit judge—among the proceedings had were the following, to wit:

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant.

Be it remembered that heretofore, to wit, on the 1st day of May, in the year of our Lord one thousand eight hundred and ninety-seven, came the plaintiff, by his attorney, and filed in the clerk's office of the court aforesaid his certain petition in this cause against the said defendant, which said petition is clothed in the words and figures following, to wit:

Petition.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant.
} Petition.

Plaintiff says that the First National Bank of Little Rock, Arkansas, is a corporation organized under the banking laws enacted by the Congress of the United States; that on the first day of
2 February, 1893, the said bank became insolvent and suspended business; that on the 6th day of February, 1893, a receiver was duly appointed by the Comptroller of the Currency of the United States to take charge of all the assets of the said bank, and administer the trust according to law; that during the month of August, 1893, said receiver, so appointed as aforesaid, resigned, and your said plaintiff was duly appointed receiver of the said bank, and for the purposes aforesaid, by the Comptroller of the Currency of the United States; that said plaintiff immediately entered upon the discharge of his duties as such receiver, and since said time has been, and still is, such receiver; that your said plaintiff is a citizen of the State of Arkansas, and that the defendant, John Joyce, is a citizen of the State of Ohio, and a resident and inhabitant of the district aforesaid. Plaintiff further says that the

said defendant, John Joyce, is indebted to plaintiff on a promissory note, of which the following is a copy, with all credits and endorsements thereon:

"Three years after date, we, or either of us, promise to pay to the order of C. H. Whittemore, a receiver of the McCarthy & Joyce Company, the sum of nine thousand ($9,000.00) dollars, with interest at six per cent. per annum from date till paid. This is one of the three notes executed for purchase-money of the assets of the McCarthy-Joyce Company, this day sold to James E. Joyce & Company.

JAMES E. JOYCE & CO.
JOHN JOYCE.

Little Rock, Arkansas, March 20th, 1893."

Endorsements: "March 21, 1894. Rec'd $540, interest to date. D. W. McClure, att'y for receiver 1st Nat. Bk. of Little Rock." "Paid July 1st, 1895, p't of int. to date, $205.50." "James E. Joyce & Co." "C. H. Whittemore, rec'r."

Plaintiff further says that the amount in controversy, exclusive of costs, exceeds the sum of two thousand dollars. There is due plaintiff from the defendant on said promissory note the sum of $9,484.50, with interest thereon from the first day of July, 1895, at the rate of six per cent. per annum. Wherefore plaintiff prays judgment against the said defendant for the sum of $9,484.50, with interest thereon from the 1st day of July, 1895, at the rate of six per cent. per annum.

OUTHWAITE & LINN,
Attorneys for Plaintiff.

STATE OF OHIO, }
Franklin County, } *ss:*

Jos. H. Outhwaite, being first duly sworn, says that he is one of the attorneys in the above-entitled action; that said plaintiff is absent from said county wherein said affiant resides; that the facts stated and allegations set forth in the foregoing complaint are true as he verily believes.

JOS. H. OUTHWAITE.

Sworn to before me and subscribed in my presence by the
3 said Jos. H. Outhwaite, this 1st day of May, 1897.

A. L. THURMAN,
Notary Public, Franklin County, Ohio. [SEAL.]

And afterwards, to wit, on the 1st day of May, A. D. 1897, came the defendant, by his attorney, and filed in the clerk's office of said court his certain entry of appearance and waiver of process in this cause; which said entry and waiver is clothed in the words and figures following, to wit:

Entry of Appearance and Waiver of Summons.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff, *vs.* JOHN JOYCE, Defendant.	Waiver of Summons and Entry of Appearance.

Said defendant, John Joyce, hereby waives the issuing and service of process in the above entitled action and voluntarily enters his appearance in this court as defendant in said action.

JOHN JOYCE,
By POWELL & MINAHAN,
His Attorneys.

And afterwards, to wit, on the 25th day of May, A. D. 1897, came the parties, by their attorneys, and filed in the clerk's office of said court their certain stipulation in this cause; which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant.

It is hereby stipulated and agreed that the clerk of the United States court be, and he is hereby, authorized to erase the word "complaint" and substitute that of "petition" in the pleading entitled "complaint" and filed in the said cause.

OUTHWAITE & LINN,
Attorney- for Plaintiff.
POWELL & MINAHAN,
Attorney- for Defendant.

4 And afterwards, to wit, on the 1st day of June, A. D. 1897, came the defendant, by his attorneys, and filed in the clerk's office of said court his certain demurrer to the petition in this cause; which said demurrer is clothed in the words and figures following, to wit:

Demurrer to Petition.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant. } Demurrer.

Comes now the defendant and demurs to the petition of the plaintiff herein filed for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant.

POWELL & MINAHAN,
Attorneys for the Defendant.

And afterwards, to wit, on the 1st day of June, A. D. 1897, came the parties, by their attorneys, and filed in the clerk's office of said court their certain stipulation in this cause; which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STIRLING R. COCKRILL, Rec'v'r of 1st Nat'n'l B'nk of Arkansas, Pl'ff,
vs.
JOHN JOYCE, Defendant. } Stipulation.

It is hereby stipulated and agreed by & between the parties to the above-entitled action that the defendant is to have until the 15th day of June, 1897, within which to file an answer in the above entitled cause, and that the demurrer hereinbefore filed be withdrawn by def't.

OUTHWAITE & LINN,
Att'ys for Pl'ff.
POWELL & MINAHAN,
Att'ys for Def't.

And afterwards, to wit, on the 14th day of June, A. D. 1897, came the parties, by their attorneys, and filed in the clerk's office of said court their certain stipulation in this cause; which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

5 STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant. } Stipulation.

It is this day stipulated by and between the parties to the above-entitled cause that the defendant have ten days from the date hereof within which to file *their* answer to the plaintiff's petition.

Approved:

OUTHWAITE & LINN,
For Plaintiff.
POWELL & MINAHAN,
Att'ys for Defendant.

And afterwards, to wit, on the 23rd day of June, A. D. 1897, an entry was made upon the journal of said court, in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (*C*, 269).

STERLING R. COCKRILL, as Receiver, &c.,
vs.
JOHN JOYCE. } 810. Entry.

Upon application of defendant herein leave is granted said defendant to file his answer in this cause in fifteen days from this date.

And afterwards, to wit, on the 7th day of July, A. D. 1897, came the defendant, by his attorneys, and filed in the clerk's office of said court his certain answer in this cause, which said answer is clothed in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant. } Answer of John Joyce.

First defense. And now comes the said John Joyce, defendant, and for his first defense to the plaintiff's petition says that he admits the First National Bank of Little Rock, Arkansas, is a corporation

organized under the banking laws of the United States; that said bank became insolvent and suspended business in February, 1893; and that in the month of August, 1893, the plaintiff, Sterling R. Cockrill, was appointed receiver of said bank by the Comptroller of the Currency of the United States, and has ever since been and is still acting as such receiver. The defendant further says that he signed the note described in the petition as a surety only for the said firm of James E. Joyce and Company, who were the
6 principal makers thereof, and for the accommodation of said James E. Joyce and Company, without any value or consideration whatever between the parties and upon the express agreement and understanding that the conditions under which said note was to be executed, as hereinafter set forth, should be fully and faithfully complied with and performed. The defendant further says that the McCarthy & Joyce Company, a trading corporation of Little Rock, Arkansas, became involved, and, being unable to pay its debts, on or about the 16th day of January, A. D. 1893, made an assignment of all its real and personal property to C. H. Whittemore, as assignee, under the assignment laws of the State of Arkansas; and, after the said assignment, the said The First National Bank, being a preferred creditor to a very large amount, accepted said assignment according to its terms, and thereupon applied to the Pulaski chancery court to have said assignee, C. H. Whittemore, appointed its receiver of all and singular the property so assigned to him, and the said court, upon said application, duly appointed said Whittemore receiver of the said property, who immediately took possession of the same and proceeded to control and administer upon the same; and thereafter, by agreement of the First national bank and all other parties interested therein, the said receiver was directed by said court to sell all of said real and personal property, which he proceeded to do; which said sale was made on the 20th of April, 1893, to James E. Joyce and Company, who became the purchasers of all of said real and personal property at and for the price of thirty-eight thousand two hundred ($38,200.00) dollars, all of which has been paid by said James E. Joyce and Company, except the note described in the plaintiff's petition, and another note of like date and amount, which was signed by Bishop Edward Fitzgerald, as surety for the said James E. Joyce and Company, which said two notes represent the unpaid purchase-money arising from said sale.

Defendant further says that at the time the order for the sale of said real and personal property was made it was expressly provided and ordered by the court that the said receiver was, in addition to obtaining endorsers or sureties upon the notes given for the deferred payments, to retain and reserve a lien, under the statutes of the State of Arkansas, upon all the real and personal property so ordered to be sold, and this defendant, knowing that said property was more than sufficient in value to pay all the deferred payments as provided for in said sale, and relying upon the faithful
7 execution of said order by said receiver, became surety upon said note described in the petition herein. Defendant further

says that said receiver, after having received said note, in violation of the order of the court, and in violation of the rights of this defendant, negligently and wrongfully failed to retain or reserve a lien upon said property, real and personal, and improperly conveyed all of said real and personal property to the said James E. Joyce and Company, free and clear of any lien whatsoever. The defendant further says that said James E. Joyce and Company, after so receiving said property, have sold and conveyed all the personal property and nearly all the real estate to third persons, who were ignorant of said order of court, made for said sale; whereby the lien which ought to have been retained and reserved has been lost and the said defendant further says that said property was sufficient in value to have fully paid said note, as well as the other note given for the deferred payments, and the said First National Bank of Little Rock, Arkansas, as well as its receiver, having received the said note with notice of the foregoing facts, this defendant is discharged and released from the said note, he asks that the plaintiff be compelled to surrender said note and that the same be canceled by order of this court.

Second defense. The defendant, for a second defense herein says that when the McCarthy-Joyce Company made an assignment of all their real and personal estate to the said C. H. Whittemore, as assignee as set forth in the first defense herein, among the property so assigned were the following sixteen promissory notes, then the property of said company, and then in the possession of the First national bank for collection: Note of Zeb Ward, Jr., dated Nov. 23, 1892, ninety days, for $430.96—E. P. Ladd, date Nov. 1, 1892, ninety days, 328.30—C. Watkins, date Sept. 12, 1892, 5 months, 491.60—Faist & Co., date Dec. 7, 1893, 60 days, 265.00—Zeb Ward, Jr., date Dec. 31, 1892, 30 days, 465.00—J. C. England, date Dec. 31, 1892, 30 days, 3,954.00—W. L. Reaves, date Dec. 26, 1892, sixty days, 164.75—Zeb Ward, Jr., date Jan'y 9, 1893, 30 days, 346.06—F. Walker for the sum of 67.00—C. E. Moore, date Sept. 14, 1892, six months, 800.00—Spring Hill Lumber Co., Sept. 1, 1892, 6 mos., 550.00—Spring Hill Lumber Co., Sept. 1, 1892, 12 mos., 550.00—Malvern Lumber Co., Sept. 4, 1892, 1 year, 1,000 00—Malvern Lumber Co., Sept. 4, 1892, 2 years, 1,000.00—C. Watkins, August 18, 1892, 6 mos., 400.00—C. Watkins, August 16th, 1892, 12 mos., 475.00.

The defendant further says that on the 30 day of January,
8 A. D. 1893, an inventory of all the property so assigned was filed in the Pulaski chancery court by said assignee in which all of said notes were described as the property of said The McCarthy and Joyce Company, and therein stated to be in the possession of the said First National Bank of Little Rock for collection. And immediately after said assignment the said First national bank, being a preferred creditor therein to a large amount, accepted said assignment according to its terms and duly applied to the said Pulaski chancery court to have said assignee, C. H. Whittemore, appointed its receiver of all and singular the property so above assigned to him, including the notes hereinbefore described and this court, upon said application, duly appointed said Whittemore

its receiver of said property and he immediately thereafter took possession of the same and proceeded to control and administer it as such receiver and thereafter, by an agreement of the parties interested in said matter and by order of said court, the said receiver was directed to sell all of said property, including the notes herein described, which he proceeded to do, and the same were duly sold to James E. Joyce and Company, who agreed to pay for the same according to the terms of the sale, the sum of $38,200; which sale was made on the 20th of April, 1893, and approved by the said court; thereupon said court directed its said receiver to deliver to the said purchasers the stock of goods, and the choses in action, including the notes hereinbefore described, so assigned by said The McCarthy and Joyce Company, which said receiver undertook so to do. The defendant further says before said purchase the said First national bank became insolvent and Logan H. Roots was duly appointed receiver thereof by the Comptroller of the Currency of the United States, and demand was made upon him for such notes by the said James E. Joyce and Company and for the proceeds of such as had been collected, but said Roots declined to surrender said notes, and thereafter said Roots departed this life and one Armstrong was duly appointed receiver of said bank, from whom said notes and the proceeds of such as had been collected, were again duly demanded of him by the said James E. Joyce and Company, but he declined to surrender the same. That afterwards, said Armstrong resigned his said receivership and the plaintiff, Sterling R. Cockrill, was duly appointed receiver of said bank, and demand has been duly made upon him for said notes and the proceeds of such as had been collected, but he has declined to surrender said notes or the proceeds of such as have been collected.

9 The defendant further says that the said James Joyce and Company paid, at the time of said purchase, the sum of $10,200, in cash and afterwards paid the sum of $10,000 more in cash, and that the note sued upon herein and a note of like date, and amount, signed by Bishop Edward Fitzgerald as surety represents the balance of the deferred payments on said purchase. This defendant says that he signed said note for James E. Joyce and Company, as surety, upon the understanding and faith that the said receiver would deliver to the principal makers of said notes the property so assigned by McCarthy & Joyce Company, including the promissory notes hereinbefore described. The defendant further says that said notes were sufficient in value to more than pay the note herein sued upon, as well as the other note given for a part of the deferred payments and signed by Bishop Fitzgerald; and says that the said First national bank and said Logan H. Roots and said Armstrong, and said Sterling R. Cockrill, as receiver of the said First national bank have wrongfully and illegally refused to deliver said notes or the proceeds of such as were collected to the said James E. Joyce and Company, as they were required to do by the terms of said sale. Wherefore this defendant says that the consideration of said note has failed and he asks that the plaintiff be required to surrender up said note, and that the same may be ordered to be can-

celed by this court and for all other and proper relief in the premises.

By POWELL & MINAHAN,
Defendant's Attorneys.

STATE OF OHIO, }
Franklin County, } *ss:*

John Joyce, the above named defendant, being by me first duly sworn, upon his oath says that the facts stated and allegations contained in the above and foregoing answer are true as he verily believes.

JOHN JOYCE.

Sworn to before me and subscribed in my presence by the said John Joyce this 6th day of July, A. D. 1897.

CHAS. SNYDER,
Notary Public, Franklin County, Ohio. [SEAL.]

And afterwards, to wit, on the 18th day of October, A. D. 1897, came the plaintiff by his attorneys, and filed in the clerk's office of said court, his certain demurrer to answer in this cause, which said demurrer is clothed in the words and figures following, to wit:

Demurrer to Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant. } Demurrer.

10 Plaintiff herein demurs to the first and second defenses contained in the answer of the defendant herein on the ground that the said defenses do not state facts sufficient to constitute a defense.

OUTHWAITE & LINN,
Attorneys for Plaintiff.

And afterwards, to wit, on the 21st day of December, A. D. 1897, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (C, 380).

810. C. C.

This cause came on to be heard on the demurrer of pl'ff to the answer of def't, and was argued by counsel; on consideration whereof the court doth sustain said demurrer and leave is granted defendant to prepare an amendment to his answer and ask leave to file the same on or before the first day of January, 1898; to all of which counsel for defendant excepts.

And afterwards, to wit, on the 5th day of March, A. D. 1898, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (*C*, 407).

STERLING R. COCKRILL, Receiver, &c.,
vs.
JOHN JOYCE.

Upon application of defendant herein by his attorney leave is granted to file an amended answer in this cause forthwith, and the same is filed.

And afterwards, to wit, on the 5th day of March, A. D. 1898, came the defendant by his attorneys and filed, by leave of court, in the clerk's office of said court, his certain amended answer in this cause, which said amended answer is clothed in the words and figures following, to wit:

Amended Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant.

No. 810. Amended Answer of John Joyce.

First defense. And now comes the said John Joyce, defendant, and for his amended answer herein and by way of first defense to the plaintiff's petition says that he admits that the First National Bank of Little Rock, Ark., is a corporation organized under
11 the banking laws of the United States; that said bank became insolvent and suspended business in Feb., 1893, and that in the month of Aug., 1893, the plaintiff, Sterling R. Cockrill, was appointed receiver of said bank by the Comptroller of the Currency of the United States, and has ever since been and is still acting as such receiver. The defendant further says that he signed the notes described in the plaintiff's petition as a surety only for the firm of James E. Joyce and Company, who were the principal makers thereof and for the accommodation of said James E. Joyce and Company, without any value or consideration whatever between the parties and upon the express agreement and understanding that the conditions under which said note was to be executed, as hereinafter set forth, should be fully and faithfully complied with and performed. The defendant further says that the McCarthy-Joyce Company, a trading corporation of Little Rock, Arkansas, became involved, and, being unable to pay its debts, on or about the 16th day of January, A. D. 1893, made an assignment of all its real and

personal property to C. H. Whittemore, as assignee, under the laws of the State of Arkansas; and, after the said assignment the said the First national bank, being a preferred creditor to a very large amount of said The McCarthy-Joyce Company, accepted said assignment according to its terms, and thereupon applied to the Pulaski chancery court to have said assignee, C. H. Whittemore, appointed its receiver of all and singular the property so assigned to him, and the said court, upon said application, duly appointed said Whittemore receiver of the said property, who immediately took possession of the same and proceeded to control and administer upon the same as receiver for said bank and other creditors of the McCarthy-Joyce Company, and thereafter, by agreement of the First national bank and all other parties interested therein, the said receiver was directed by said court to sell all of said real and personal property, which he proceeded to do, and which said sale was made on the 20th day of April, 1893, to James E. Joyce and Company, who became purchasers of all of said real and personal property at and for the price of thirty-eight thousand two hundred ($38,200.00) dollars, all of which has been paid by said James E. Joyce and Company, except the note described in the plaintiff's petition, and another note of like date and amount which was signed by Bishop Edward Fitzgerald as surety for the said James E. Joyce and Company, which said two notes represent the unpaid purchase-money arising from said sale.

12 Defendant further says that at the time the order for the sale of said real and personal property was made it was expressly provided and ordered by the court that the said receiver was, in addition to obtaining endorsers or sureties upon the notes given for the deferred payments, to retain and reserve a lien upon all the real property so ordered to be sold under the statutes and laws of the State of Arkansas, by reciting in the deeds of conveyance therefor that the purchase-money for said lands had not been paid, and reserving in said deeds a lien upon said lands for all unpaid purchase-money, including the note sued on herein; and this defendant, knowing that said property was more than sufficient in value to pay all the deferred payments as provided for in said sale, and relying upon the faithful execution of said order by said receiver, became surety upon said note described in the petition herein. Defendant further says that said receiver, after having received said note, in violation of the order of the court, and in violation of the rights of this defendant, negligently and wrongfully failed to retain or reserve a lien in said deeds of conveyance upon the said real estate so sold and improperly conveyed all said real property to the said James E. Joyce and Company free and clear of any lien whatsoever. This defendant further says that said James E. Joyce and Company, after receiving said property, have sold and conveyed nearly all the real estate to third persons, who were ignorant of said order of court, made for said sale; whereby the lien which ought to have been retained and reserved has been lost; and the said defendant further says that said property was sufficient in value to have fully paid said note, as well as the other note given for the

deferred payments, and this defendant says that the said First National Bank of Little Rock, Arkansas, as well as its receiver, the plaintiff herein, received the said note with notice of all the foregoing facts, and the said note was transferred to the plaintiff herein without any consideration being paid therefor but for the sole purpose of transferring the said note to the plaintiff as the successor in interest of the said former receiver of said First National Bank of Little Rock, wherefore this defendant is discharged and released from said note, and he asks that the plaintiff be compelled to surrender said note and that the same be cancelled by order of this court.

Second defense. The defendant, for a second defense herein, says that when the McCarthy-Joyce Company made an assignment of all their real and personal estate to the said C. H. Whittemore, as assignee as set forth in the first defense herein, among the
13 property so assigned were the following sixteen promissory notes, then the property of said company, and then in the possession of the First national bank for collection. Note of Zeb Ward, Jr., dated Nov. 23, 1892, ninety days, $430.96; E. P. Ladd, dated Nov. 1, 1892, ninety days, 328.20; C. Watkins, Sept. 12, 1892, five months, 491.00; Faist & Co., Dec. 7, 1893, sixty days, 265.00; Zeb Ward, Jr., Dec. 31, 1892, thirty days, 465.00; J. C. England, Dec. 31, 1892, thirty days, 3,954.00; W. L. Reaves, Dec. 26, sixty days, 164.75; Zeb Ward, Jr., Jan. 9, 1893, thirty days, 346.06; F. Walker, 67.00; C. E. Moore, Sept. 14, 1892, six months, $800.00; Spring Hill Lumber Co., Sept. 1, 1892, 6 months, 550.00; Spring Hill Lumber Co., Sept. 1, 1892, 12 months, 550.00; Malvern Lumber Co., Sept. 4, 1892, 1 year, 1,000.00; Malvern Lumber Co., Sept. 4. 2 years, 1,000.00; C. Watkins, Aug. 18, 1892, 6 months, 400.00; C. Watkins, Aug. 16, 1892, 12 months, 475.00. The defendant further says that on the 30th day of Jan'ry, A. D. 1893, an inventory of all the property so assigned was filed in the Pulaski chancery court by said assignee in which all of the said notes were described as the property of the said McCarthy and Joyce Company and therein stated to be in the possession of the First National Bank of Little Rock, for collection. And immediately after the said assignment, the said First national bank, being a preferred creditor therein to a large amount of the McCarthy-Joyce Company accepted said assignment, according to its terms, and duly applied to the said Pulaski chancery court to have said assignee, C. H. Whittemore, appointed its receiver of said property, and he immediately thereafter took possession of the same and proceeded to control and administer it as such receiver, and thereafter, by an agreement of the parties interested in said matter, including the said First National Bank of Little Rock, and by order of said court, the said receiver was directed to sell all of said property, including the notes herein described, which he proceeded to do, and the same were fully sold to James E. Joyce and Company, who agreed to pay for the same according to the terms of said sale, the sum of $38,200.00; which sale was made on the 20th day of April, 1893, and approved by the said court; thereupon the said court directed its said receiver to deliver

to the said purchasers the stock of goods and the choses in action, including the notes herebefore described, as assigned by said The McCarthy & Joyce Company which said receiver undertook so to do. The defendant further says before said purchase the said First national bank became insolvent and Logan H. Roots was duly appointed receiver thereof by the Comptroller of the Currency of the United States and demand was made upon him for such notes
14 by the said James E. Joyce and Company and for the proceeds of such as had been collected, but said Roots declined to surrender said notes, and thereafter Roots departed this life and one Armstrong was duly appointed receiver of said bank, from whom said notes and the proceeds of such as had been collected, were again duly demanded of him by the said James E. Joyce and Company, but he declined to surrender the same; that afterwards said Armstrong resigned his said receivership and the plaintiff, Sterling R. Cockrill, was duly appointed the receiver of said bank, and demand had been duly made upon him for said notes and the proceeds of such as had been collected, but he has declined to surrender said notes or the proceeds of such as have been collected. The defendant further says that the said James E. Joyce and Company paid, at the time of said purchase the sum of $10,200.00 in cash, and afterwards paid the sum of $10,000 00 more in cash and that the note sued upon herein and a note of like date and amount signed by Bishop Edward Fitzgerald as surety represents the balance of the deferred payments on said purchase. This defendant says he signed said note for James E. Joyce and Company as surety, upon the understanding and faith that the said receiver would deliver to the principal makers of said notes the said property so assigned by McCarthy and Joyce Company, including the promissory notes hereinbefore described. The defendant further says that said notes were sufficient in value to more than pay the note herein sued upon, as well as the other note given for a part of the deferred payments and signed by Bishop Fitzgerald, and says that the First national bank and said Logan H. Roots and said Armstrong, and said Sterling R. Cockrill as receivers of the First national bank have wrongfully and illegally refused to deliver said notes or the proceeds of such as were collected to the said James E. Joyce and Company, as they were required to do by the terms of said sale. Wherefore this defendant says that the consideration of said note has failed and he asks that the plaintiff be required to surrender up said note, and that the same may be ordered to be canceled by the court and for all other and proper relief in the premises.

By POWELL & MINAHAN,
Attorneys for Defendant, John Joyce.

STATE OF OHIO, }
Franklin County, } ss:

Edson B. Dennis, being by me first duly sworn, upon his oath says that he is the agent of John Joyce, the defendant in the above-entitled action, duly authorized in the premises; that said John

Joyce is now absent from the county of Franklin and State
15 of Ohio and in southern California, and that affiant believes the facts stated and allegations contained in the above and foregoing answer are true as he verily believes.

EDSON B. DENNIS.

Sworn to before me and subscribed in my presence by the said Edson B. Dennis, this 3rd day of March, A. D. 1898.

CHAS. SNYDER,
Notary Public, Franklin County, Ohio. [SEAL.]

And afterwards, to wit, on the 5th day of March, A. D. 1898, came the plaintiff by his attorneys and filed in the clerk's office of said court, his certain demurrer to the amended answer in this cause, which said demurrer is clothed in the words and figures following, to wit:

Demurrer to Amended Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff, *vs.* JOHN JOYCE, Defendant.	Demurrer to Amended Answer.

Plaintiff herein demurs to the first and second defenses contained in the amended answer of the defendant herein on the ground that the said defenses do not state facts sufficient to constitute a defense.

OUTHWAITE & LINN,
Attorneys for Plaintiff.

And afterwards, to wit, on the 5th day of March, A. D. 1898, an entry was made upon the journal of said court, in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (C, 407).

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, Receiver, etc., Plaintiff, *vs.* JOHN JOYCE, Defendant.	No. 810.

The defendant having by leave of the court filed an amended answer herein, this cause came on to be heard on the demurrer of plaintiff thereto and was argued by counsel; on consideration whereof the court doth sustain said demurrer, and the defendant not desiring further to amend his said answer or to further or otherwise plead in this action, and this cause coming on further to be

heard on the petition, the court find there is due plaintiff from this defendant on the cause of action in the petition stated, the
16 sum of $9,484.50, principal debt, and $1,522.25 interest to the 4th day of March, A. D. 1898, in all, $11,006.75. It is therefore considered and adjudged by the court, that the plaintiff Sterling R. Cockrill as receiver of the First National Bank of Little Rock, Arkansas, recover of the defendant, John Joyce, the said sum of eleven thousand and six dollars and seventy-five cents ($11,006.75) and his costs herein expended, taxed at $—, and execution is awarded for said judgment and costs. To which judgment and finding our said demurrer the defendant excepts. And he also excepts to the judgment of the court in rendering judgment in this action.

And afterwards, to wit, on the 1st day of April, A. D. 1898, came the defendant by his attorneys and filed in the clerk's office of said court, his certain petition for writ of error, in this cause, which said petition for writ of error is clothed in the words and figures following, to wit:

Petition for Writ of Error.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN JOYCE, Plaintiff in Error, *vs.* STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Defendant in Error.	Petition for Writ of Error.

Now comes the plaintiff in error, John Joyce, and here shows to the court that in the proceedings and judgment in a case lately pending in the circuit court of the United States, southern district of Ohio, eastern division, wherein Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, was plaintiff, and the said John Joyce was defendant, there is manifest error, as shown in the assignment of error herewith filed. Whereupon the plaintiff in error asks for the allowance of a writ of error, and that the amount of a supersedeas bond be fixed by the court in order to stay execution in said case, and that a citation issue pursuant to the statute in such case made and provided.

By THOS. E. POWELL,
Attorney for John Joyce.

And afterwards, to wit, on the 1st day of April, A. D. 1898, came the defendant by his attorneys and filed in the clerk's office of said court, his certain assignment of errors in this cause, which said assignment of errors is clothed in the words and figures following, to wit:

17 *Assignment of Errors.*

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver for the First National Bank of Little Rock, Arkansas, Defendant in Error. } Assignment of Error.

Now comes the above-named plaintiff in error and here shows to the court that in the proceedings and judgment of the circuit court of the United States, southern district of Ohio, eastern division, in a cause lately pending therein, wherein Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, was plaintiff, and John Joyce was defendant, there is manifest error in this, to wit: 1. The court erred in sustaining the demurrer of the plaintiff in said case to the answer of the defendant. 2. The court erred in sustaining the demurrer of the defendant to the amended answer of the plaintiff. 3. The court erred in not overruling said demurrers. 4. The court erred in rendering a judgment in favor of the plaintiff in said case instead — the defendant. 5. Other errors apparent upon the record.

Whereupon the said plaintiff in error asks that the said judgment of the circuit court of the southern district of Ohio, eastern division, be reversed and held for naught, and that the said plaintiff in error be restored to all things he has lost by reason thereof.

By THOS. E. POWELL,
Attorneys for John Joyce.

And afterwards, to wit, on the 1st day of April, A. D. 1898, an entry was made on the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (*C*, 416).

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver for the First National Bank of Little Rock, Ark., Defendant in Error. } Journal Entry.

This day came the said John Joyce, plaintiff in error, and presented his petition for an allowance of writ of error, and an assignment of error- accompanying the same. Which petition upon consideration of the court is hereby allowed, and the court allows a

writ of error to the United States circuit court of appeals for the sixth circuit and fixes the supersedeas bond to stay execution in said case at $24,000, with sufficient surety to the approval of this court.

18 And afterwards, to wit, on the 14th day of April, A. D. 1898, there was filed in the clerk's office of said court, a certain supersedeas bond on writ of error in this case, which said supersedeas bond is clothed in the words and figures following, to wit:

Supersedeas Bond on Writ of Error.

Know all men by these presents, that we, John Joyce as principal, and John Joyce, Jr., and T. Ewing Miller, as sureties, are held and firmly bound unto Sterling R. Cockrill, receiver of the First National Bank of Little Rock, Arkansas, in the just and full sum of twenty-four thousand dollars, to be paid to the said Sterling R. Cockrill, receiver of the First National Bank of Little Rock, Ark., his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

Whereas, lately at a circuit court of the United States for the southern district of Ohio, eastern division, in a suit depending in said court, between John Joyce and Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, a judgment was rendered against the said John Joyce, and the said John Joyce having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Sterling R. Cockrill as receiver of the First National Bank of Little Rock, Arkansas, citing and admonishing him to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the thirteenth day of May next. Now, the condition of the above obligation is such, that if the said John Joyce shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN JOYCE. [SEAL.]
JOHN JOYCE, JR. [SEAL.]
T. EWING MILLER. [SEAL.]

Sealed and delivered in presence of—
THOS. E. POWELL.
C. P. WHITE.

Approved by—
WM. H. TAFT,
Circuit Judge.

3—329

SOUTHERN DISTRICT OF OHIO, *ss:*

I, John Joyce, Jr., one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth forty-eight thousand dollars, in my own name, situate in the
19 county of ——, in said district.

JOHN JOYCE, JR.

Sworn to before me the 13th day of April, 1898.

C. P. WHITE,
Dep. Clerk U. S. Circuit Court, S. D. O. [SEAL.]

SOUTHERN DISTRICT OF OHIO, *ss:*

I, T. Ewing Miller, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth forty-eight thousand dollars in real estate in my own name, situate in the county of —— in said district.

T. EWING MILLER.

Sworn to before me the 13th day of April, 1898.

C. P. WHITE,
Dep. Clerk U. S. Circuit Court, S. D. O. [SEAL.]

THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Eastern Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause, as the same appears of record and on file in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Columbus, Ohio, this 19th day of April, A. D. 1898.

B. R. COWEN, *Clerk,*
[SEAL.] By C. P. WHITE, *Deputy.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, } *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of Ohio, eastern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Sterling R. Cockrill as receiver of the First National Bank of Little Rock, Arkansas, and John Joyce, a manifest error hath happened, to the great damage of the said
20 John Joyce, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if the judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the* thirteenth day of May next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-second.

[SEAL.] B. R. COWEN,
Clerk of the Circuit Court of the United States, S. D. O.,
By ROB'T C. GEORGI, *Dep.*

Allowed by—
——— ———,
———.

* Not exceeding 30 days from the day of signing the citation.

No. 810. United States circuit court, southern district of Ohio, eastern division. Filed Apr. 14", 1898. B. R. Cowen, clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, }

To Sterling R. Cockrill, receiver of the First National Bank of Little Rock, Arkansas, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit,
21 on the * thirteenth day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein John Joyce is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-second.

WM. H. TAFT,
Circuit Judge.

April 14, '98.

* Not exceeding thirty days from the day of signing.

STATE OF OHIO, *County of Franklin,* } ss:

On this 18th day of April, A. D. 1898, personally appeared before me, a notary public in and for said county, James Farley, U. S. deputy marshal, and made oath that he delivered a copy of within citation to T. P. Linn, attorney, etc.

[SEAL.] JAMES FARLEY.

Sworn to and subscribed before me this 18th day of April, 1898.

ALEXANDER H. JOHNSON,
Notary Public, Franklin Co., Ohio.

UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } ss:

Received this writ on the 18th day of April, 1898, at Columbus' Ohio, and on the same day I executed the same by handing a true copy thereof with all the endorsements thereon to T. P. Linn, who is attorney for the within-named Sterling R. Cockrill, receiver for the First National Bank of Little Rock, Arkansas, who accepted service for the same.

MICHAEL DEVANNEY,
U. S. Marshal S. D. O.,
Per JAMES FARLEY, *Deputy.*

22 *Fees.*

1 copy	50
1 mi. of writ	06
1 service	2 00
	2 56

No. 810. Marshal's civil docket No. 576. United States circuit court, southern district of Ohio, eastern division. Sterling R. Cockrill, as receiver, &c., *vs.* John Joyce. Citation. Filed Apr. 19, 1898. B. R. Cowen, clerk.

23 And afterwards, to wit, on April 26th, 1898, the appearance of Thomas E. Powell, counsel for the plaintiff in error, was filed, which reads and is in the words and figures as follow:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1897.

JOHN JOYCE
v.
STERLING A. COCKRILL, Receiver First National Bank of Little Rock. } No. 613.

To the clerk of said court:

Please enter my appearance as counsel for the plaintiff in error.

THOMAS E. POWELL,
Counsel for Plaintiff in Error.

And afterwards, to wit, on September 15th, 1898, a stipulation was filed, which is in the words and figures following:

Stipulation.

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN JOYCE, Plaintiff in Error,
v.
STERLING COCKRILL, Receiver of First National Bank of Little Rock.

24 We hereby consent to the filing of brief for defendant in error.

POWELL & MINIHAN,
Counsel for Plaintiff in Error.

And afterwards, to wit, on December 20th, 1898, an entry was made upon the journal of said court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN JOYCE
v.
STERLING A. COCKRILL, Receiver, etc.

Error from the Circuit Court of the United States for the Southern District of Ohio. Before Judges Taft, Lurton, and Severens.

This cause coming on for hearing is argued on behalf of plaintiff in error by Mr. Thomas E. Powell, and the further hearing of the cause is continued until tomorrow.

And afterwards, to wit, on December 21st, 1898, an entry was made upon the journal of said court in said cause which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN JOYCE
v.
STERLING A. COCKRILL, Receiver, etc.

25 This cause is further argued by Mr. Thomas E. Powell for plaintiff in error, and by Mr. T. P. Linn for defendant in error, and is submitted.

And afterwards, to wit, on March 7th, 1899, a judgment was rendered in said cause which reads and is as follows:

Judgment.

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN JOYCE *v.* STERLING A. COCKRILL, Receiver First National Bank of Little Rock.	# 613. Error to the Circuit Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

And afterwards, to wit, on March 18th, 1899, a printed opinion was filed in said cause which reads and is as follows:

Opinion.

26 United States Circuit Court of Appeals, Sixth Circuit.

JOHN JOYCE *v.* STERLING R. COCKRILL, Receiver First National Bank of Little Rock.	No. 613. Error to the Circuit Court of the United States for the Southern District of Ohio.

Submitted December 21, 1898; decided March 7, 1899.

Before Taft and Lurton, circuit judges, and Severens, district judge.

Opinion by LURTON, *Circuit Judge:*

This is an action upon a promissory note made by James E. Joyce & Co., and the plaintiff in error, John Joyce as surety. The note is one of several made for the purchase price of the assets of an insolvent trading corporation, sold under order and directions of a chancery court at Little Rock, Ark. All the notes were payable to a receiver appointed by said court, and the note in suit was assigned to the First National Bank of Little Rock, which sues through the defendant in error, its duly appointed receiver. The suit was by petition according to the Ohio Code practice, and was against John Joyce only. Joyce by answer presented two defenses. There was a general demurrer going to both defenses, which the court sustained. The defendant below refused to further plead, whereupon the court rendered judgment for the amount of the note, interest and costs. The action of the court in sustaining the demurrer to the answer has been assigned as error. The property sold by the receiver consisted of a stock of goods and merchandise, real estate and choses in action. It was sold in bulk for the gross price of $38,200.00. The note in suit is for $9,000, is dated March

20, 1893, and is payable three years after date. The decree of sale directed the receiver to require personal security upon the
27 deferred payments and to reserve a lien in his deed of conveyance of the real estate included in the sale.

The first defense of the answer is, that the said John Joyce became the surety of James E. Joyce & Co. upon the agreement and understanding that the lien directed by the court would be reserved. It is then averred that the receiver negligently and in violation of said order of the court conveyed said real estate without reserving any lien in his deed, and that said James E. Joyce & Co. have since sold and conveyed said property to third persons, who were ignorant of said order of court made for said sale "whereby the lien which ought to have been retained and reserved has been lost." It is further averred that the value of the real estate so sold was sufficient to pay the unpaid purchase-money consisting, as alleged, of the note in suit and of another of like amount outstanding, upon which one Fitzgerald is sole security. These facts are plead in discharge and relief of plaintiff in error as surety upon the note in suit. While it is stated in the answer that the agreement and understanding between the plaintiff in error and the principal debtors was that the receiver should retain or reserve a lien, as provided by the statute law of Arkansas, in his deed conveying to said James E. Joyce & Co. the real estate, which was part of the consideration for which this note was executed, and that the Little Rock bank, to whom the note was subsequently assigned, took the note with knowledge of the facts stated in the petition, yet it is not averred that the receiver, who was to reserve the lien, was informed when he accepted the note or before he conveyed the land, that any such conditions were attached by the surety to his liability. It is not stated whether the note was delivered to the receiver by the surety or by the purchasers of the property. But whether by the one or the other, plaintiff in error chose to remain silent as to any conditions or intrusted the note for delivery to the purchasers and is equally bound by the silence of the latter. A surety is not discharged even against the payee by evidence that the obligation upon which he is sued was delivered to the principal obligor upon conditions which have not been performed, if the payee accepted the instrument without notice and would sustain loss if deprived of the security upon which he relied. This principle has been applied to official bonds as well as to promissory notes and other negotiable paper. Thus in Dair *v.* United States, 16 Wall., 1, a distiller's bond, perfect upon its face, was signed by a surety and delivered to one of the principal obligees upon condition that it should not be delivered unless it was executed by other persons who did not execute it. The obligee had no notice of this condition and accepted it. It was held these facts constituted no defense by the surety, who had thus signed the bond upon a
28 condition which had not been performed. To the same effect are the cases of Amis *v.* Marks, 3 Lea, 568, and Buford *v.* Cox, 3 Lea, 518, State *v.* Potter, 63 Mo., 212, State *v.* Peck, 53 Me., 284. Neither will a surety upon a promissory note, or a private bond, in the hands of the payee, be discharged upon evidence that

he had signed the note or bond upon conditions not performed, but of which the payee had no notice.

Jordon *v.* Jordon, 10 Lea, 124; Russell *v.* Freer, 56 N. Y., 67; McCormick *v.* Bay City, 23 Mich., 457: Davis *v.* Gray, 61 Texas, 506; Merriam *v.* Rockwood, 47 N. H., 81.

But it is insisted that by the neglect of the receiver a lien has not been reserved which would, through subrogation, have enured to the benefit of the surety. Undoubtedly the general principle is, that if a creditor do any act inconsistent with the rights of the surety and injurious to him, or omits to do any act which his duty to the surety obliges him to do, and thereby injures the surety, the latter will be discharged to the extent of such injury. Story's Eq. Juris., sec. 693–325. So a surety is entitled to the benefit of all securities which the creditor obtains from the principal debtor, and if the creditor by any affirmative act surrender them to the debtor, or they are lost through the neglect of some duty owing to the surety, the latter will be exonerated, to the extent of the loss thus sustained. Evans *v.* Kister *et al.*, decided at this term. The facts of this case do not bring it within the principles relied upon. The receiver surrendered no lien. He never had a lien. He might have acquired one by an express reservation in his deed to the purchasers, but in no other way. The case would be very different if he had released such a lien after it had arisen. But the complaint is that he might have acquired a lien and chose not to do so, and to rely alone upon the purchaser and his surety. It may be admitted that he failed in his duty by not reserving a lien as directed by the decree. But to whom was this duty due? To the court and to the parties interested in the proceeds of sale. It was a duty imposed upon him by the court for the protection of the owners of the property and the creditors interested in its sale. Admit that he failed in the discharge of this official duty. Can this surety obtain any benefit therefrom? If so, it will be at the expense of the creditors who, having lost one security through the negligence of the receiver, will be deprived of the benefit of another which he did take. Yet the negligence of the creditors thus to be punished does not equal that of the surety who seeks to make it available for his own release. If those interested in the proceeds of the sale should have seen to it that the receiver did not neglect to take this lien, quite as much may be said as to the surety. He either delivered the note himself, or suffered his principals to deliver it to the receiver, without notice that his liability was to depend upon
29 the reservation of this lien. It is incredible that the receiver would have accepted the note subject to such conditions, or, if he did, that he would have conveyed the property without reserving a lien. Upon the averments of the answer the assignee of this note stood upon no higher footing than the receiver would if he in his official character were plaintiff. Still the negligence of the surety in failing to give notice to the receiver of the conditions upon which he was to become liable, and in failing to see that the receiver's deed reserved the lien directed by the court, is greater than

that of the owners of the property or the creditors interested in the proceeds of sale.

But this loss or injury has come about through the neglect of a public official to execute properly a duty imposed by the decree under which he was acting. That duty was imposed not for the benefit of the sureties who might strengthen the notes of the purchaser, but for the benefit of the parties to the cause. He was, therefore, under no active or affirmative duty to the surety. He had no notice of the conditions upon which the surety had signed nor of his reliance upon the lien of a vendor for his protection. The performance of this official duty might have prevented loss to this surety. But mere laches or negligence, or non-performance of some act which might have benefited a surety, will not, in the absence of some express covenant or condition, discharge a surety. The neglect must be of some duty owing to the surety. In the case of The Board of Supervisors *v.* Otis *et al.*, 62 N. Y., 88–92, the sureties upon the official bond of a county treasurer sought to be discharged from liability upon their obligation because of the neglect of other county officials whose duty it was to make stated examinations of the accounts of the treasurer. The court held that this duty was one owing to the public and not to the sureties. In that case the court stated the rule as between sureties and obligees in a way which meets our approval. "Mere passive negligence," said the court, "or laches of an obligee or creditor, mere non-performance of some affirmative act which if performed might prevent loss to the surety, will not, in the absence of some express covenant or condition to that effect, discharge a surety, and that the neglect of duty which is available as a defense for a surety must be of some duty owing to the surety, and not to others; some positive duty undertaken in behalf of and for the benefit of the surety." To the same effect is the case of Warnell *v.* Williams, adm'r, 19 Texas, 180, where the sureties upon the note of a purchaser at an administrator's sale sought to be released from liability upon the ground that the Texas statute and the order of the court required that a mortgage should be taken at such sales upon property sold, and that they would not have become sureties except in reliance upon this statute and order, and that the neglect of the administrator to take the security required by statute and order of the court should operate to relieve them. The Texas court held that upon these facts the sureties were not released. In Dye *v.* Dye, 21 Ohio State, 93, the general principle is thus stated:

"'A creditor may, however, in many ways do that which, though it may not affect the liability of the principal, will exonerate sureties. In all such cases the discharge of the surety is based on some recognized and well-defined principle, and, in general, results from a positive act of the creditor which operates to the perjudice of the surety. Passiveness on the part of the creditor will not discharge the surety, unless he omits to do, when required by the surety, what the law or his duty enjoins him to do, or unless he neglects, to the injury of the surety, to discharge his duty in any matter in which he occupies the position of a trustee for the surety. The discharge

of the surety is not claimed in this case by reason of any positive act of the creditor, not by reason of his neglect to prosecute the claim, after being required by the surety to do so by notice in writing, in accordance with the statute; nor, indeed, by reason of his neglect to comply with any requirement of the surety whatever, for, from aught that appears, the passiveness of the surety equaled that of the creditor. Nor did the creditor have anything in his hands, actually or constructively, in the nature of a trust. Then, upon the principles already so broadly stated, it would seem that the surety was not exonerated from liability on the note.'"

To the same general effect are the cases of Schroeppell *v.* Shaw, 3 N. Y., 446; Humphrey *v.* Hitt, 6 Gratton, 509; Sawyer *v.* Bradford, 6 Ala., 68; Mendhorf *v.* Singer, 124 Mass., 77.

The learned counsel for plaintiff in error have cited and relied upon a number of cases, including the cases of Burr *v.* Boyer, 2 Neb., 265; and Wolf and Billing *v.* Jay, 7 Queen's Bench, 761. Most of them are distinguishable from the case in hand, but in so far as they are in conflict with the cases cited and relied upon, it is enough to say that they do not meet with our approval and are not in accord with the great weight of authority. The cases of Burr *v.* Boyer, *supra*, and Wolf and Billing *v.* Jay, *supra*, were cases in which an actual existing security was lost by the neglect of the creditor to register the instrument. Without stopping to consider these cases, it is enough to say that they are distinguishable from the one at bar by the fact, that no existing lien has been sacrificed and that the only fault of the creditor here complained of, is, that he did not reserve a lien when he might and should have done so in obedience to the order of the court.

There remains the defense of failure of consideration. This defense rests upon the averment that among the assets of the McCarthy, Joyce Company, sold to James E. Joyce & Co., were certain promissory notes then in possession of the defendant in
31 error as receiver for the First National Bank of Little Rock, and that said receiver, though often requested, has refused to surrender same to said James E. Joyce & Co. The consideration which is sufficient to support the principal's contract is the consideration upon which that of the surety rests. It follows, therefore, that if the consideration upon which this note was executed by the principal makers was sufficient, that there is no failure of consideration which can be available to the surety, unless his own engagement was entered upon under some other and independent agreement. This the answer attempts to show by the statement that the defendant became surety "only upon the understanding and faith" that all of the assets of the McCarthy, Joyce Company, sold to his principals, James E. Joyce & Co., including the notes then in the possession of the bank or its receiver, would be delivered to said purchasers, and the failure to obtain said notes is relied upon as constituting a failure of consideration. This, if true, would constitute only a conditional obligation, and failure to comply with the condition would discharge the surety without regard to its effect upon the obligation of his principals. It is manifest, however,

that the averments of the answer are insufficient to discharge the surety, for it is not averred that either the court or its receiver, the payee of the note, accepted the note and delivered the assets for which it was in part executed with notice of any condition. The authorities for this conclusion have been already cited in disposing of the first defense.

Undoubtedly a surety may, when the contract has not been assigned to a purchaser for value without notice, when called upon to perform, show either a total or partial failure of the consideration of his principal's contract. But such a defense when made by the surety must be one which would be available to the principal if sued. Here again the averments of the answer are insufficient. This note in suit was not executed for any specific part of the property purchased by James E. Joyce & Co., but was made in part consideration for a lumping sale of the entire assets of the McCarthy, Joyce Company, consisting of lands, a stock of merchandise and a mass of choses in action. The averment is that among these choses in action were certain promissory notes aggregating about $11,000.00, payable to that company, which had been placed by the payee in possession of the Little Rock bank for collection, and which were so in possession of that bank, or its receiver, both when that company made its general assignment and when its assets were sold to James E. Joyce & Co. The ground upon which the bank's receiver, the defendant in error, refused to surrender these notes is not stated, though, as it is stated that the bank was a large creditor of the said McCarthy, Joyce Company, it is most probable that it asserted a banker's lien thereon to secure its general
32 account as a creditor. But if we assume, as probably we should in view of the averments of the answer, that the defendant in error would be estopped to assert such a lien, the bank having been a party to the suit in which it is averred a decree was rendered directing the sale, we are driven to the inevitable conclusion that James E. Joyce & Co. obtained the superior title to said notes subject to no incumbrance in the nature of a banker's lien. The purchasers obtained, upon this hypothesis, just what the surety asserts they bought. That the purchaser knew that the notes in question were not actually in the custody of the court or its receiver when this sale occurred sufficiently appears, for the claim to these notes is rested upon the averment that the receiver had scheduled them as assets "in possession of the bank for collection." So it is stated that after the sale had been reported and confirmed and the terms of sale complied with by the purchasers, an order was made directing the court's receiver to deliver to the purchasers the property so sold, including said notes so at the time in possession of the defendant in error. It further appears that all of the property so sold was delivered to said purchasers and proper conveyance made, except these notes. It is then stated that the said purchasers had made repeated demands upon the said bank and its receiver, the defendant in error, for said notes or their proceeds, but that such demand had been refused, and that the defendant in error continues to withhold said notes or their proceeds. No objection was taken

in the court in which the sale was made by reason of this refusal of one of the parties to the cause to deliver these notes to the purchaser. No effort was then made to rescind the contract or to obtain any abatement of price or to obtain an order of that court upon the defendant in error for these notes. Upon the contrary, the case as made by the answer establishes that the purchaser bought, along with the other assets, certain notes at the time in possession of the defendant in error, and by the decree obtained the title and right to same or their proceeds. They have not yet secured same, though on the facts stated, no good reason is shown why they may not assert their title through appropriate legal proceedings. Upon this view of the case there can be no pretense that the consideration of the principal's contract has failed in whole or part. Subsequently the note in suit seems to have been assigned to the bank's receiver by Wittemore, the court's receiver. Inferably, this was done in course of the distribution of the assets among the creditors. It is averred that the defendant in error took the note with knowledge of the facts stated in the defendant's answer. We have, therefore, assumed that the note is subject to all defenses which could be made against the original payee.

As the defense of failure of consideration would not be
33 available to the principals in the note in a suit against them by the payee, it is a defense not available to their surety. It may be that upon the facts stated in this answer there exists against the defendant in error a liability to account to the principals of the plaintiff in error for the notes in question or their proceeds. But such liability constitutes an independent right of action to recover the notes themselves, or for damages for their detention or conversion. But that is a right of action which belongs to the principals and cannot be claimed or asserted by their surety. It is certainly not a right of set-off belonging to the surety, for only mutual claims are the subject of set-off. That it might be asserted as a counter-claim by the principals, if sued, may be conceded. Even then they would be under no obligation to set it up by way of recoupment or counter-claim, for if the facts do not constitute a failure of consideration, they might reserve their claim and bring a separate action. Under sec. 5072 of the Ohio Civil Code, the counter-claim which a defendant may set forth in his answer "must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition." Manifestly this is not a right of action in favor of the surety upon which "a several judgment might be had." But upon general principles this liability of the defendant in error to account for the notes in question cannot be relied upon as either a set-off or counter-claim. First, because if it be set up and allowed here, it must bar any future action by the principal makers of the note. Second, the answer shows another note of like amount outstanding upon which a different person is liable as surety. One surety has no more right to appropriate this counter-claim for his own benefit than the other. If each should be sued and make the same defense, how would their

conflicting claims to control and appropriate this counter-claim be reconciled? In Gillespie *v.* Torrance, 25 N. Y., 306, the suit was, as here, against the surety upon a note and the defense was a failure of consideration. The note was given for the price of timber sold to the principal maker of the note. The timber was in a raft and the quantity and quality was estimated upon certificates of a surveyor. The defense was that there was a gross mistake as to quantity and a breach of warranty in that respect as well as in quality. The court held that the defense of failure of consideration was not made out and that the surety could not avail himself of the breach of warranty as to quantity or quality. The court said that though there seemed "a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach
34 of warranty," that it was an equity in which Van Pelt was interested to even a greater extent than the defendant, and could not be disposed of without having him before the court. In Lasher *v.* Williamson, 55 N. Y., 619, the action was against the sureties of a lessee who sought to defend by showing that the plaintiff, as part of the contract between himself and their principal lessee, had agreed "to furnish to him during the period of the lease a certain quantity of property to be stored upon the leased premises at an agreed price," and that he breached this agreement. The court said:

"'The breach of that promise gave (the lessee) a cause of action against the plaintiff, but this cause of action in favor of Gibbs (the lessee and principal maker of the bond), cannot be available to the sureties. It belongs to Gibbs and not to them.' * * * 'The non-performance or partial performance of Lasher's engagement to Gibbs is not to be regarded as a failure of consideration, but as an independent cause of action, which Gibbs, and he only, may assert. It is in his election to determine whether it shall be used defensively or whether he will bring his own action for the damages, or whether he will forego his claim altogether. The defendants have no control over him in this respect and cannot borrow and avail themselves of his rights.'"

It is proper to observe that neither set-off nor counter-claim were set forth as distinct defenses in the answer. Without admitting that either defense could be made under the defense of failure of consideration, we have preferred to treat the defenses as if properly pleaded.

There was no error in sustaining the demurrer to the answer and the judgment will be affirmed.

35 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of John Joyce *vs.* Sterling R. Cockrill, receiver of the First National Bank of Little Rock, No. 613, October term, 1898, as the same remains upon the

files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 29th day of May, 1899.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

36 In the Supreme Court of the United States.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Defendant in Error.

At law.

Petition for Writ of Error.

And now comes John Joyce, plaintiff in error herein, and says that on or about the 7th day of March, A. D. 1899, the United States circuit court of appeals for the sixth circuit entered judgment against him in favor of the defendant in error, Sterling R. Cockrill, receiver of the First National Bank of Little Rock, Arkansas, for the sum of $9,484.50, and the interest thereon, making the judgment in all more than eleven thousand dollars, in a case then pending in said United States circuit court of appeals for the sixth circuit, wherein said John Joyce was plaintiff in error and the said Sterling
37 R. Cokrill, as receiver of the First National Bank of Little Rock, Arkansas, was defendant in error, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of this plaintiff in error, and there is manifest error in said judgment and proceedings, as shown in the assignment of errors herewith filed with this petition in error.

The said plaintiff in error further says that the jurisdiction in said court did not depend entirely upon the opposite parties to the said suit or controversy being aliens and citizens of the United States or citizens of different States, nor did said cause arise under the patent laws, nor under the revenue laws, nor under the criminal laws, and the said cause was not an admiralty cause, nor was said cause one in which the said circuit court of appeals had final jurisdiction, but said cause was one in which there is given the right of a writ of error for the review of said cause by the Supreme Court of the United States, according to the provisions of section 6 of the act entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes."

38 Wherefore the plaintiff in error asks for the allowance of a writ of error herein to the United States circuit court of

appeals for the sixth circuit for the correction of the errors so complained of, and that a transcript of the records, proceedings, and papers in said cause, duly authenticated, may be certified and sent to this court, and that the said judgment in said cause against him be reversed, annulled, and altogether held for naught, and that he may be restored to all things he has lost by occasion of said judgment.

THOMAS E. POWELL AND
THOMAS B. MINAHAN,
Attorneys for Plaintiff in Error.

Allowed this April 29th, 1899. If superseded, bond in penalty of $24,000. If only bond for costs, penalty of $500.

JOHN M. HARLAN.

39 [Endorsed:] In the Supreme Court of the United States. John Joyce, plaintiff in error, *vs.* Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas. At law. Petition for writ of error.

40 In the Supreme Court of the United States.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Defendant in Error.

At law.

Assignment of Errors.

And now comes the above-named plaintiff in error and here shows to the court that in the proceedings and judgment of the United States circuit court of appeal- for the sixth circuit, in a cause lately pending therein wherein John Joyce was plaintiff in error and Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, was defendant in error, there is manifest error, in this, to wit:

1. The said court erred in affirming the judgment of the circuit court below.

2. The court erred in finding there was no error in the judgment or proceedings of the circuit court.

3. The court erred in sustaining the demurrer of the
41 plaintiff below to the original and amended answers of the defendant below.

4. The court erred in not overruling said demurrers.

5. The court erred in rendering judgment in favor of the defendant in error in said cause instead of the plaintiff in error.

6. Other errors apparent upon the record.

Wherefore the said plaintiff in error asks that the said judgment of the United States circuit court of appeals for the sixth district

be reversed and held for naught, and that the said plaintiff in erro be restored to all things he has lost be reason thereof.

THOMAS E. POWELL AND
THOMAS B. MINAHAN,
Attorneys for Plaintiff in Error.

42 [Endorsed:] In the Supreme Court of the United State John Joyce, plaintiff in error, *vs.* Sterling R. Cockrill, as r ceiver of the First National Bank of Little Rock, Arkansas. A law. Assignment of error-.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges the United States circuit court of appeals for the sixth circui Greeting:

Because in the record and proceedings, as also in the rendition the judgment of a plea which is in the said United States circu court of appeals, before you or some of you, between John Joyc plaintiff in error, and Sterling R. Cockrill, as receiver of the Fir National Bank of Little Rock, Arkansas, defendant in error, a man fest error hath happened, to the great damage of the said plaintiff i error, as by his complaint appears, we, being willing that error, any hath been, should be duly corrected and full and speed justice done to the parties aforesaid in this behalf, do command yo if judgment be therein given, that then, under your seal, di tinctly and openly, you send the record and proceedings afor said, with all things concerning the same, to the Supreme Court the United States, together with this writ, so that you have th same in the said Supreme Court, at Washington, within 30 day from the date hereof, that, the record and proceedings aforesai being inspected, the said Supreme Court may cause further to b done therein to correct that error what of right and according t the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W Fuller, Chief Justice of the Unite States, the 8th day of May, in the yea of our Lord one thousand eight hu dred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

May 8th, 1899.

44 UNITED STATES OF AMERICA, *ss:*

To H. F. Auten, successor of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein John Joyce is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 8th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

45 COLUMBUS, OHIO, *May* 16, '99.

Service of the within citation in error is hereby acknowledged, and the appearance of H. F. Auten, as successor to Sterling J. Cockrill, defendant in error, is hereby entered.

JOSEPH H. OUTHWAITE,
TALFOURD P. LINN,
Att'ys for Def't in Error.

46 Know all men by these presents that I, John Joyce, as principal, and John Joyce, Jr., as surety, are held and firmly bound unto H. F. Auten, successor of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, in the full and just sum of twenty-four thousand ($24,000.00) dollars, to be paid to said H. F. Auten, successor to Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, or to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a session of the United States circuit court of appeals for the sixth circuit, in a suit depending in said court between John Joyce, as plaintiff, and Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, as defendant, a judgment was rendered against the said John Joyce on or about the 5th day of March, A. D. 1898, in said cause, in the sum of eleven thousand six and seventy-five hundredths ($11,006.75) dollars, together with interest thereon, at the rate of 6 *% per cent.* per annum, from the 5th day of March, A. D. 1898, and the said John Joyce having obtained leave and filed a copy thereof in the clerk's

office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said H. F. Auten, successor to Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said John Joyce, his executors, administrators, or assigns, shall
47 prosecute said action to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN JOYCE. [SEAL.]
JOHN JOYCE, JR. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in the presence of—

THOS. B. MINAHAN.
JOSEPH F. BURKLEY.

Approved by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

May 8th, 1899.

COLUMBUS, O., *May* 2, '99.

We hereby certify that John Joyce and John Joyce, Jr., whose names are signed to the above bond, are in our judgment sufficient, provided they are satisfactory to the court.

OUTHWAITE & LINN,
Att'ys for Cockrill, Receiver, and H. F. Auten, Successor.

I believe this security to be good.

WM. H. TAFT,
Circuit Judge.

Endorsed: In the Supreme Court of the United States. John Joyce, plaintiff in error, *vs.* Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, defendant in error. Bond.

48 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of an appeal bond filed June 13, 1899, in the case of John Joyce *et al. vs.* Sterling B. Cockrill, rec., etc., No. 613, October term, 1898, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals. Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 13th day of June, 1899.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

49 In the Supreme Court of the United States.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Defendant in Error. } No. —. Stipulation.

It is hereby stipulated between the parties above named that since the commencement of the above action in the United States circuit court of appeals for the sixth circuit Sterling R. Cockrill has ceased to be receiver for the First National Bank of Little Rock, Arkansas, and his powers as such receiver have ceased, and that H. F. Auten has been appointed as the successor of the said Sterling R. Cockrill as receiver of said The First National Bank of Little Rock, Arkansas, and is now the duly qualified and acting receiver of said bank.

It is therefore agreed between the said parties that the said H. F. Auten, as receiver of the First National Bank of Little Rock, Arkansas, be substituted in the place of Sterling R. Cockrill as defendant herein, and the clerk of the Supreme Court of the United
50 States is hereby authorized and empower- to make such substitution.

Approved this 1st day of May, A. D. 1899.

POWELL & MINAHAN,
Attorneys for Plaintiff in Error.
OUTHWAITE & LINN,
Attorneys for Defendant in Error.

51 [Endorsed:] In the Supreme Court of the United States. John Joyce, pl'ff in error, *vs.* Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, def't in error. Stipulation.

Endorsed on cover: File No., 17,443. U. S. C. C. of appeals, 6th circuit. Term No., 329. John Joyce, plaintiff in error, *vs.* H. F. Auten, successor of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas. Filed June 22nd, 1899.

No. 1209. 83

Brief of Powell for P. in E.

OFFICE SUPREME COURT U.S.
FILED
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JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

[October Term, 1899.]

Filed April 20. 14, 1900.

JOHN JOYCE,

PLAINTIFF IN ERROR.

vs.

H. F. AUTEN, SUCCESSOR OF STERLING R. COCKRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF LITTLE ROCK, ARKANSAS,

DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of Plaintiff in Error.

THOMAS E. POWELL &
THOMAS B. MINAHAN,
Counsel for Plaintiff in Error.

F. B. TOOTHAKER, Law Printer, 8-10 N. Third St., Columbus, O.

SUPREME COURT OF THE UNITED STATES.

[October Term, 1899.]

JOHN JOYCE,

PLAINTIFF IN ERROR.

vs.

H. F. AUTEN, SUCCESSOR OF STERLING R. COCKRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF LITTLE ROCK, ARKANSAS,

DEFENDANT IN ERROR.

[No. 329.]

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

In the original petition filed in the Circuit Court, the plaintiff declared upon a promissory note executed by James E. Joyce & Company as principals and John Joyce, the plaintiff in error here, as surety. The note was dated at Little Rock, Arkansas, March 20, 1893, payable to C. H. Whittemore, as receiver of The McCarthy & Joyce Company for the sum of $9000.00, due three years after date, with interest at six per cent.

There was embodied in the note the following declaration;

"This is one of the three notes executed for purchase money of the assets of The McCarthy and Joyce Company, this day sold to James E. Joyce & Company."

To this petition John Joyce, as surety, filed an answer setting out two separate defenses. A general demurrer filed to both defenses was sustained by the Circuit Court. Thereupon John Joyce, by leave, filed an amended answer, and to both defenses set out therein a general demurrer was again filed, and likewise sustained by that court, and judgment entered against John Joyce for $11,006.75, the full amount due upon the note.

The action of the Circuit Court in sustaining the demurrers was assigned for error in the Circuit Court of Appeals for said District and upon hearing there the judgment of the Circuit Court was affirmed.

The plaintiff in error claims here that these demurrers should not have been sustained, but should have been overruled and that there is error in the judgments of both courts below.

In the first defense set out in the answer of John Joyce to the petition filed against him he declared that James E. Joyce & Company were the principals upon the said note and that he signed the same only as surety for said James E. Joyce & Company and without any other consideration. He further declared that the note was given as one of the deferred payments for the purchase price of a large number of tracts of land in Little Rock, Arkansas, belonging to the insolvent firm of The McCarthy and Joyce Company. That said property was sold by a receiver by virtue of an order of the Chancery Court at Little Rock. That in the order of sale the receiver was directed to reserve a lien upon the real estate sold to secure the deferred payments and that he was also directed in addition to such reserved lien upon the real estate to take further security by personal endorsements.

The real estate was purchased at such sale from the receiver by James E. Joyce & Company, as declared in the note sued upon, and a very large portion of the purchase money was paid in cash. The defendant, John Joyce, knowing these facts, and that a lien upon the real estate sold would be sufficient to secure the deferred payments, consented to sign the note set out in the petition as surety for the said James E. Joyce & Company. He declared further that the statutes of Arkansas expressly provide that a lien upon real estate sold may be reserved in the deed of conveyance by reciting the fact that the property has not been paid for and reserving a lien for the purchase money. He further states that, knowing such a lien would be ample protection to him in the premises he signed the note upon the express agreement and understanding that the said lien should be reserved and the order of the court in the premises faithfully complied with and performed. He further declares that after receiving said note, and without his knowledge or consent, the receiver neglected and failed to reserve a lien for the purchase money upon the lands sold, as directed by the court, and conveyed all the real estate so sold to the said James E. Joyce & Company, free from any lien thereon, and that the said James E. Joyce & Company, since receiving the said conveyance, sold and conveyed the lands to third parties who were ignorant of the facts, and the lien which should have been preserved has become lost.

He further avers that said property was sufficient in value to have fully paid said note and that the First National Bank of Little Rock, Arkansas, as well as its receiver, who was the plaintiff below, received the said note with full notice of all the facts set out in said answer, and he therefore claimed that he was discharged and released from said note.

POINTS AND ARGUMENT.

I.

The statutes of Arkansas expressly provide that a lien upon real estate may be reserved in the deed of conveyance by reciting the fact that the property has not been paid for, and reserving a lien for the purchase money.

Section 474 of the Revised Statutes of Arkansas provides:

"A lien or equity held or possessed by the vendor of real estate, when the same is expressed upon or appears upon the face of the deed of conveyance, shall inure to the benefit of the assignee of the note, or obligation given for the purchase of such real estate, and may be enforced by such assignee."

This section of the statutes of Arkansas has frequently been passed upon by the Supreme Court of that state. In numerous decisions the Supreme Court of Arkansas has held that when such a lien is expressed upon the face of the conveyance it operates to secure the purchase money the same as if a mortgage had been given.

In the case of *Stroud vs. Pace and Allison*, 35 Arkansas, 100, it is said: "The purchaser of real estate is bound to take notice of all stipulations contained in the chain of title through which he derives title, and to fully investigate and explore everything to which his attention is thereby directed, and if any of such conveyances contain notices that the land has been sold on a credit, he is bound to inform himself as to whether the purchase money has been paid."

In the case of *Shepherd vs. Thomas*, 26 Arkansas, 628, it is held: "Where a vendor stipulates for a lien to secure the purchase price and gives proper notice to all who may be concerned, such lien then becomes a security of such purchase, and may be enforced by the vendor, or he may assign

it to another, and such holder may enforce it, and all being notified that the purchase money remains due and unpaid, justice and equity requires it shall be paid and all subsequent contractors must stipulate to meet such equities."

In other words, the reservation upon the face of a conveyance operates to secure the purchase price of real estate for all persons and against all persons, exactly as if a mortgage had been taken. The order of the court, therefore, to the receiver in this case, to reserve a lien upon the property sold, was to reserve a lien which would be good for all persons and against all persons claiming an interest in the property. In other words, it is a mortgage incorporated in the deed of conveyance.

II.

In determining the rights of the surety in this case under the allegations of his answer, we claim the following principles are elementary:

1. The surety is entitled to the benefit of all the securities in the hands of the creditor and if any be lost by his wilful neglect or want of due diligence, the surety is, to that extent, discharged.

2. If the surety signs the obligation upon the understanding that certain conditions shall be performed, and the creditor knows these conditions, the surety will not be bound if the conditions are not complied with.

3. A surety is released when the creditor parts with a lien for the payment of the principal debt, to which the surety has the right of subrogation.

4. A rule never to be lost sight of in determining the liability of a surety is that he is a favorite of the law and has a right to stand upon the strict terms of his obligation when such terms are ascertained.

5. If through the neglect of the creditor a security to the benefit of which the surety is entitled is lost or not properly perfected, the surety is discharged to the extent that he is injured thereby.

In the case of *Hickock vs. Farmers' Bank*, 35 Vermont, 476, it was held that where a surety signed a promissory note upon the payee promising that as soon as the note became due he would immediately proceed against the principal, the note became due and for over a year the payee failed to sue the principal or notify the surety, and the principal became insolvent. The Court held that the surety was discharged.

In *Jones vs. Kerr*, 30 Georgia, 93, the creditor promised, as an inducement for the sureties to sign the note, that he would assign a judgment and execution which he had against the principal. Instead of doing so he brought suit upon the note. The court held that the sureties were discharged.

Brandt on Suretyship and Guaranty, Section 440, states the rule as follows:

"The creditor who has effects of the principal in his hands or under his control for the security of the debt is a trustee for all parties concerned and if said effects are lost through the negligence or want of ordinary diligence of the creditor the surety is discharged to the extent that he is injured, the same as if the effects had been lost by the positive act of the creditor."

In the case of *Burr vs Boyer*, Second Nebraska, 265, it is held:

"A surety will be discharged by the neglect of the creditor to have a chattel mortgage recorded, made to him by the debtor to secure the debt, if such neglect occasion a loss of the security; but the creditor is not bound to enforce by action securities which he may have taken from the debtor."

In the case of *Law vs. The East India Company*, 4th Vesey, 824, it is said:

"Any act of the obligee that may injure a surety is laid hold of in his favor."

In the case of the *City Bank vs. Young*, 43d New Hampshire, 457, it was held:

"When a creditor disposes of personal property mortgaged to him by the principal as collateral security, he is responsible to the surety for ordinary care and prudence in the sale and the application of the proceeds."

In *Wolff & Billings vs. Jay*, 7 Queen's Bench, 756, it was decided:

"As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship; if the creditor who has had or ought to have had them in his full possession or power, loses them or permits them to get in possession of the debtor, or does not make them effectual by giving proper notice, the surety, to the extent of such security, will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands," and numerous cases are cited in support of this statement.

In the case of *Gillespie vs. Darwin*, 6th Heiskell, 21, it is said:

"In equity it is well settled that a surety is entitled to the benefit of all securities which the creditor obtains against the principal debtor, and if the creditor who has had, *or ought to have had*, them in his full possession or power loses them, or permits them to get into the possession of the debtor,

the surety will, to the extent of such security, be discharged."

In the case of *Watts vs. Shuttleworth*, 5 Hurtstone and Norman, 235, H, by articles of agreement, agreed with W, (plaintiff) to complete certain fittings for a warehouse for £3450. The contract contained a stipulation that W "shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary." The defendant agreed with the plaintiff to guarantee the due performance of the work by H. The plaintiff advanced £1800 to H, after which the fittings were destroyed by fire. He became insolvent and never repaid the £1800 to the plaintiff or any part of it.

Held: That the plaintiff ought to have insured the fittings, and having omitted to do that which his duty toward the defendant required him to do, and which if he had done, the defendant would have been relieved to the extent of the insurance, the defendant was discharged.

This case was afterwards affirmed in the Exchequer Chamber.

In the 14th American Reports, 389, the defendant signed a bond as surety on condition that the principal would also procure the signature of S—— as surety thereto. In a suit on the bond by the obligee, it was held that the bond was void as to the defendant.

Theobald, in his work on the law of Principal and Surety, declares the rule to be that "if the creditor parts with securities or any fund which he would be entitled to apply in discharge of his debt, the surety becomes exonerated at least to the extent of the value of such securities because securities which the creditor is entitled to apply in discharge of his debt he is bound so to apply, or to hold them as trustee ready to be applied should the surety desire it.

Cooper vs. Joel, De Gex, 240. Upon the eve of a sale by a sheriff a surety gave a written guarantee for the payment of the judgment debts by installments, in consideration of the judgment creditors consenting to postpone the sale under execution. It turned out that the consent of another person was necessary to prevent the sale and in consequence the sale took place. The surety gave notice that the consideration had failed and the guarantee was at an end. It appeared that representations were made in behalf of the judgment creditors when they took the guarantee that they had power to stop the sale and that it would be stopped. Held, that the surety was entitled to have the guarantee delivered up to be canceled.

The demurrer to the answer in this case admits the facts which entitle the surety to the protection of the above well recognized rules of law.

1. John Joyce signed the note upon the understanding and agreement that the lien upon the real estate sold should be reserved and the creditor knew of this condition, but with such knowledge he neglected and refused to comply with the conditions.

2. The creditor had in his possession property which would have been ample protection to the surety, and by the creditor's wilful neglect the surety lost the benefit of such security.

3. The order of court which directed the sale of this property also directed the Receiver to reserve a lien upon the property sold. He knew Joyce became surety upon the understanding that this order would be complied with. This lien, which would have been ample protection for the surety, was lost through the negligence of the creditor.

The judgment of the Circuit Court of Appeals is largely based upon the proposition that the receiver had no notice that Joyce had signed upon the conditions named.

In order to reach this conclusion the court must have overlooked the closing allegation of the first defense in Joyce's

amended answer, which is as follows: "This defendant says that the said The First National Bank of Little Rock, Arkansas, as well as its receiver, *the plaintiff herein, received the said note with notice of all the foregoing facts*, and said note was transferred to the plaintiff herein without any consideration being paid therefor, but for the sole purpose of transferring the said note to the plaintiff as successor in interest of the former receiver of The First National Bank of Little Rock."

Again, in order to reach the conclusion arrived at by the Circuit Court of Appeals, they were compelled to deny facts admitted upon the record.

In the opinion of the court which appears upon the record (folio 28) appears the following statement: "It is incredible that the receiver would have accepted the note subject to such conditions, or if he did, that he would have conveyed the property without reserving the lien." The answer of Joyce clearly alleges that the receiver did the very act which the Circuit Court of Appeals says is incredible, and the demurrer to this answer admits the allegation to be true.

The Circuit Court of Appeals again places great weight upon the claim that it was the duty of the surety to notify the receiver that he had signed upon this condition, and his liability is based upon the alleged negligence of the surety in failing to give this notice and in failing to see that the receiver did reserve the lein directed by the court.

The court here overlooks the fact that the receiver did have notice of this condition, and therefore why should the surety a second time give him notice of a fact of which he already had knowledge?

We also think that as the order of sale expressly directed the receiver to reserve this lein, he was bound to do so and in law he was bound to know that the surety upon the note was

signing upon the full faith that the order of the court would be complied with. We do not think that anyone can be charged with negligence in placing faith and credit in an order of court and that an officer of the court will faithfully execute such order. It must be remembered in this case that the receiver who is charged with negligence was not a stranger to the record. He was a party to the case and the same order which gave him authority to sell also directed him to reserve a lien.

But, in addition to this, we have the fact averred in the answer that the Bank of Little Rock was a party to the proceedings and to the order of sale and that the bank, as well as its receiver, had knowledge of all the facts averred upon which the surety claims a discharge.

Finally, the Circuit Court of Appeals seems to place its decision upon the ground that the creditors of The McCarthy & Joyce Company will suffer loss. In the opinion (folio 28) appears the following language: "Admit that he (meaning the receiver) failed in the discharge of this official duty. Can the surety obtain any benefit therefrom? If so, it will be at the expense of the creditors, who, having lost one surety through the negligence of the receiver, will be deprived of the benefit of another which he did take. Yet the negligence of the creditors thus to be punished does not equal that of the surety who seeks to make it available for his own release."

The court here assumes that the surety was guilty of negligence. No such fact appears upon the record. On the contrary due diligence on his part appears.

Again, the creditors will not suffer loss by the discharge of the surety. The receiver and his bondsmen would be liable to the creditors for all injury they may have sustained by reason of the wilful negligence and default of the receiver.

The Circuit Court of Appeals again make the declaration: "He (meaning the surety) either delivered the note himself or suffered his principals to deliver it to the receiver without notice that his liability was to depend upon the reservation of this lien."

This statement, we claim, is a clear mistake, because it is distinctly averred in Joyce's answer that the receiver did have notice of the condition the failure to comply with which the surety says operated in law to discharge him. A careful comparison of the opinion of the Circuit Court of Appeals with the first defense of Joyce's answer will show that the court arrived at the conclusion laid down in the opinion by directly contraverting facts which are admitted upon the record.

It appears from the above statements that the court must have reached its opinion by overlooking important allegations in defendant's answer and if the admitted facts had been kept in mind by the court a different conclusion would have been reached.

The rule applying to such cases is well stated in Section 445, 2d Brandt on Suretyship: "It is true the books speak of the creditor being under no obligation to exercise active diligence for the protection of the surety as long as the surety himself remains inactive, and that to discharge the surety the creditor must be guilty of some wrongful act, as by a release or fraudulent surrender of the pledge.

"The cases holding this doctrine are mostly cases which decide that the creditor is not bound to enforce and realize upon securities held by him before proceeding against the surety. But it is one thing to convert the securities given by the debtor into money, that they may be applied to satisfy the debt of the principal debtor, and quite another to preserve such securities that they may be made so available. While

the creditor may be relieved from the former, he should be held responsible for the loss of any security arising from his wrongful acts, *either of omission or commission*. Can he who has taken the security stop short and omit to do that which renders it chiefly valuable under the excuse that others did not urge him to file it?"

In *Toomer vs. Dickerson*, 37, Ga., 428, the court said:

"An act of omission on the part of the creditor when the law requires him to act may be quite as potent for mischief to the surety as an act of commission."

In the case of *Teaff vs. Ross*, 1 O. S., 469, Thurman, Justice, said:

"Nor can it be gainsaid that where the creditor who has the securities, suffers them by his laches to become valueless, he is in no better condition than if he had released that security."

In the case at bar the Circuit Court of Appeals held that if the receiver had taken the lien and afterwards released it, the surety would be discharged. Is there any difference between releasing a lien and failing to take one which the law and the order of court under which the receiver acted required him to take? We submit there is no difference between the two cases.

Capell vs. Butler, 2 Sim. & Stu., 457, is a leading case. In this case A became surety for B on a bond conditioned for the payment of an annuity to C. Various securities for the annuity were put up by B, and among them he assigned two ships to C. The assignment was not recorded as required by the ship registry acts, and B afterwards sold the ships and became insolvent, and the ships were lost as security.

Held: That C, by his neglect to record the assignment discharged A to the extent of the value of the ships.

In *City Bank vs. Young*, 43 N. H., 457, it was said:

"Between this class of cases, namely the release of securities by the direct act of the creditor, and allowing them by want of ordinary care to be lost, we are unable to perceive any solid distinction. In both cases the surety may have been lulled into security and prevented from taking the counter security he otherwise would."

The above propositions can be sustained by an almost unlimited number of citations. We will, however, in addition to the above, content ourselves with citing in this connection the following authorities:

Schrock vs Miller, 10 Penna. St., 401.
Holt vs. Brody, 18 Pa. St., 207.
Cummings vs. Little, 45 Maine, 187.
Baker vs Briggs, 19 American Decisions, 311.
Moore vs Gray, 26 O. S., 525.

III.

We also claim that the courts below erred in sustaining the demurrer to the second defense set out in the answers of John Joyce. This second defense declares that at the time of the sale The First National Bank of Little Rock had possession of some sixteen promissory notes, amounting in the aggregate to about $11,000. A full list of the notes, with the names of the makers, the dates thereof, and the time of maturity are fully set forth in said defense.

Mr. Joyce further claimed that these notes were included in the inventory and in the order of sale and that they were purchased by The McCarthy & Joyce Company at the receiver's sale, and that the purchase of said notes constituted a part of the consideration for which the note sued on herein was given. He further says that he signed the note herein described as surety upon the understanding and faith that the

said receiver would deliver to the principals on said note the promissory notes described in said defense.

He further claims that the said notes were sufficient in value to more than pay the note in controversy in this case. He further declares that the said James E. Joyce & Company paid in cash at the time of such purchase the sum of $10,200, and afterwards paid the sum of $10,000 more in cash, and that the notes described in the second defense which were sold and were to be delivered to The McCarthy & Joyce Company were sufficient in value to have paid the balance of the entire purchase money, and that the receiver of The First National Bank and his successors in interest have wrongfully refused to deliver said notes, although often requested so to do by the said James E. Joyce & Company and as they were required to do by the terms of said sale.

We submit that this second defense constitutes a complete defense of failure of consideration.

In order to sustain the demurrer to this part of the answer it was necessary for the court below to find that The First National Bank of Little Rock must have held the notes as security for some claim of the bank and that the bank must have had a banker's lien upon the notes. There is nothing in the record to justify such an assumption. On the contrary, it appears from the answer and the demurrer thereto that there was no such claim and that the Bank at Little Rock did not have any lien, banker's or otherwise, upon said notes.

It was claimed by counsel on the other side that it was impossible to separate these notes from the other properties sold and conveyed. The rule of law as we understand it is that a partial failure of consideration is a good defense *pro tanto*, provided such part as is alleged to have failed is separate, distinct and definite, or the failure of a specific and ascertained part can be shown by way of defense. In this case the notes in controversy were separate and distinct property from the

real estate sold, and it presents a case of the failure of a specific and ascertained part of the property which was sold.

In other words, these notes were all the notes which were included in the sale and they were separate and distinct property from the other assets which were sold at that time. We claim, therefore, that the property was distinct and definite and that the partial failure which relates to the non delivery of these notes is as good a defense *pro tanto* as if there had been an entire failure of the entire consideration of the notes.

As these notes, if turned over to the principal, were sufficient in value to have placed in their hands sufficient property to have entirely paid the note in controversy, our claim is that by the wrongful withholding of them from the purchasers the consideration of the note in controversy has failed and that John Joyce as surety thereon is discharged from his obligation.

We therefore submit that there are errors appearing in the record in the judgments of both courts below, and we therefore ask that the said judgments may be reversed and the cause remanded. Respectfully submitted,

By THOMAS E. POWELL &
THOMAS B. MINAHAN,
Counsel for Plaintiff in Error.

No. 83.

Brf. of Outhwaite & Linn for D.

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Clerk.

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Supreme Court of the United States.

(October Term, 1899.)

JOHN JOYCE, *Plaintiff in Error*,

vs.

H. F. AUTEN, Successor of STERLING COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, *Defendant in Error*.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

Joseph H. Outhwaite,
Talfourd P. Linn and
Outhwaite, Linn & Thurman,
Counsel for Defendant in Error.

COLUMBUS:
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No. 329.

Supreme Court of the United States.

(October Term, 1899.)

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vs.

H. F. AUTEN, Successor of STERLING COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, *Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The petition filed in the Court below was an ordinary declaration upon a promissory note made and executed by James E. Joyce & Co., of Little Rock, Arkansas, and John Joyce, plaintiff in error, dated at Little Rock, Arkansas, March 20th, 1893, due three years after date and payable to the order of C. H. Whittemore, as receiver of the McCarthy-Joyce Co. This note was, by said Whittemore, as such receiver, duly endorsed and assigned to the Receiver of the First National Bank of Little Rock, Arkansas, before maturity, and is sued upon by the defendant in error, Sterling J. Cockrill, who was at the date of the commencement of this action, the duly appointed Receiver of said First National Bank. An answer was filed in the Court below by plaintiff

in error, Joyce, to which answer the defendant in error demurred, and his demurrer was sustained by his Honor, Judge SAGE. Afterwards, on March 5th, 1898, plaintiff in error filed an amended answer, to which amended answer a demurrer was also filed. This demurrer was likewise sustained by his Honor, Judge SAGE, and plaintiff in error thereupon not desiring to further amend, judgment was rendered in favor of defendant in error against John Joyce, plaintiff in error, for eleven thousand and six dollars and seventy-five cents ($11,006.75) and costs of suit, upon March 5th, 1898.

From this judgment plaintiff in error prosecuted error to the United States Circuit Court of Appeals for the Sixth Circuit, and such proceedings were had therein, that, on the 7th day of March, 1899, a judgment was rendered in said Court, affirming the judgment of said Circuit Court.

After the commencement of said proceeding in error in the Circuit Court of Appeals, Sterling J. Cockrill ceased to be Receiver for said First National Bank of Little Rock, Arkansas, and one, H. F. Auten, was duly appointed as his successor as such receiver, and is now acting as such. And by stipulation of the parties herein (See Record, page 35), is defending this action in error, as successor to said Sterling J. Cockrill.

From the judgment of the Circuit Court of Appeals, plaintiff in error now prosecutes error in this Court. The issue joined is upon facts set out in the petition and in the amended answer of Joyce.

STATEMENT OF FIRST DEFENSE.

Two defenses are set out. The first is, in substance, that the plaintiff in error, Joyce, signed the note in controversy as surety only for the firm of James E. Joyce & Co., and upon the express agreement and understanding that the conditions under which he so signed as surety, *as such conditions are set*

out in the first defense, should be fully complied with. These conditions the defense alleges to have been that prior to the execution of the note, the McCarthy-Joyce Co., a trading corporation of Arkansas, made an assignment of all its property to one, C. H. Whittemore; that the First National Bank of Little Rock, Arkansas, being a preferred creditor of said McCarthy-Joyce Co., for a very large amount, accepted said assignment according to its terms, and thereupon applied to the proper Court of Arkansas to have said assignee, Whittemore, appointed receiver of said property of the McCarthy-Joyce Co., so assigned. That upon said application, Whittemore was appointed such receiver, and immediately took possession, as receiver, of the property theretofore assigned. That thereafter, by agreement of the First National Bank and all parties interested, said receiver was directed to sell all the real and personal property of the McCarthy-Joyce Co., in his hands, and that he did so sell said property on the 20th day of April, 1893, to James E. Joyce & Co., who, as part of the purchase money for said property, executed the note sued upon, with other notes. It is further alleged, that at the time of the sale it was by the Court ordered that the receiver, in addition to obtaining sureties upon the notes given for the deferred payments for said property, was to reserve a lien upon all of the real property so sold in accordance with the statutes of Arkansas, and that the plaintiff in error, knowing that the property sold was more than sufficient in value to meet the deferred payments, including the note sued upon, and relying upon the reservation of said lien by the receiver, became surety upon the note. The defense further alleges, that the receiver, Whittemore, failed to so reserve a lien upon property sold as ordered by the Court, and that he conveyed the same to James E. Joyce & Co., unencumbered, and that said James E. Joyce & Co. have since sold nearly all of the real estate so conveyed to inno-

cent parties, thereby, it is alleged, releasing the lien ordered to be retained by the Court, to the damage of plaintiff in error; said property so sold being alleged to have been sufficient in value to have paid all of the deferred payments to the receiver. It is further alleged, that the First National Bank of Little Rock, Arkansas, received the note sued upon, with notice of the facts, and "that the said note was transferred to the plaintiff herein, without any consideration being paid therefor, but for the sole purpose of transferring said note to plaintiff, as the successor in interest of the said former receiver of the said First National Bank of Little Rock." The record shows an endorsement of interest received by the First National Bank before the maturity of the note sued upon, and there is no allegation in the amended answer that the note was not transferred before maturity.

STATEMENT OF SECOND DEFENSE.

The second defense, in substance, alleges that at the time of the assignment of the McCarthy-Joyce Co. to C. H. Whittemore, certain promissory notes, at that time the property of said McCarthy-Joyce Co., were in possession of the First National Bank of Little Rock, Arkansas, for collection; that in the inventory of the property so assigned said notes were scheduled as the property of the McCarthy-Joyce Co. in the possession of said Bank for collection. That the First National Bank accepted said assignment according to its terms, and applied to the proper Chancery Court to have said Whittemore appointed receiver of all of the assets of the McCarthy-Joyce Co. That said Whittemore immediately qualified as such receiver and took possession of said assets. That by order of the Chancery Court appointing him as such receiver, he was directed to sell all the property, including said notes, and that in pursuance of said order he did sell said notes for the specified sum on the 20th day of April,

1893. That said sale was private, and the Chancery Court ordering the appointment of such receiver, thereupon directed him to deliver to the purchasers at said sale of stock of goods so sold and the choses in action, including the notes set out in said second defense; that the said Bank, before said sale, became insolvent, and one Roots was appointed its receiver and demand made upon him as such receiver for said notes by the purchasers at said sale, James E. Joyce & Co., and for the proceeds of such as had been collected, which demand was refused. That thereafter one Armstrong was appointed receiver of said Bank to succeed said Roots, and like demand was made upon him and refused. That said Armstrong resigned as such receiver and the plaintiff below, Cockrill, was thereupon appointed receiver of said Bank, and like demand made upon him and refused. That the plaintiff in error, Joyce, signed said note for James E. Joyce & Co., as surety, on the understanding and faith that the receiver of said Bank would deliver to the principal makers of said note the promissory notes set out in the answer. That said notes were more than sufficient in value to pay the note sued upon, together with another note of like amount representing the balance of the unpaid purchase money at said sale. That by the refusal to deliver said notes or the proceeds of such as had been collected, the consideration for the note sued upon, so far as Joyce was concerned, has failed, and plaintiff in error is entitled to its cancellation and surrender.

ARGUMENT.

FIRST DEFENSE.

The attempt of the first defense is to show that the Bank was not an innocent holder of the note sued upon for value, and that Joyce, as surety, is entitled to relief for the reason that Whittemore, the Receiver of the McCarthy-Joyce Co.,

neglected to retain a lien on certain real estate as he was ordered by the Court to do, and that the real estate having passed into the hands of innocent holders, the surety is deprived of any benefit therefrom. It is not questioned by the pleadings, but on the contrary it affirmatively appears, that the note in question was transferred to the Receiver of the First National Bank of Little Rock by the Receiver of the McCarthy-Joyce Co. in part payment of the preferred indebtedness of the Bank against the McCarthy-Joyce Co. The endorsement on the note also shows that this transfer was made before maturity, and no allegation appears in the answer that it was not so transferred.

Such transfer being in the ordinary course of business in like cases, made the Bank an innocent holder of the note for value. It is argued, however, that the Bank, or its receiver, was not such innocent purchaser for value, for the reason that no direct allegation to this effect appears in the petition. The petition is in the ordinary form prescribed by the Code, Section 5086 Revised Statutes of Ohio (old Section 122), which is as follows:

> "What is sufficient pleading upon instrument for payment of money only. In an action, counter-claim or set-off, founded upon an account, or upon an instrument, for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument, with all credits and indorsements thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims with interest; and when others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, it shall be necessary to state the facts which fix their liability."

This form has been repeatedly held good by the Supreme Court of Ohio as an allegation of the transfer for value to a *bona fide* endorsee.

"In an action on a promissory note, where the petition is in the form prescribed in section 122 of the Code, whether the plaintiff is an original party to the note or not, the extrinsic facts, which show his right or title to the note, need not be expressly averred. The allegation of title is implied, by force of the statute, in the statement that there is due to him a specific amount on the note which he claims."

Sargent v. *Railroad Company*, 32 Ohio State, 449.

"In order, therefore, to secure the protection afforded to the bona fide endorsee of such an instrument before maturity, by a party who pleads under section 122, it is necessary to give a copy of the endorsement relied on in the pleadings."

Tisen v. *Hanford*, 31 Ohio State, 193.

Such copy of the endorsement is set out in the petition herein.

"There is always a presumption, when the payee's or an endorser's name is endorsed upon the bill or note, that it was done before maturity, and likewise a presumption that the holder acquired the instrument before maturity, whether the legal title be transferable by endorsement or by delivery merely."

Daniel on Negotiable Instruments, section 784.

If, as we claim, the allegations of the petition and amended answer, taken together, show that the defendant in error was an innocent holder of the note, for value, then the facts alleged constitute no defense against his action, and whatever rights the plaintiff in error may have as against the original payee or endorser of the note, if he had any such rights, he must pursue them against such payee or endorser. The rule upon this subject is too well settled to need citation.

But it is argued that defendant in error, having notice of the alleged facts set up in the amended answer, is not such innocent holder for value, and that Joyce, as surety, is enti-

tled to relief because of such alleged notice, and because of the facts set out.

In order to defeat the action of the Bank's receiver, Joyce, as surety, must allege and prove, either that by some affirmative act of defendant in error as endorsee he has been deprived of some remedy as against his principal, or that conditions precedent to his undertaking the contract of suretyship, which conditions were known to the endorsee, the bank, and without which conditions he would not have entered into the contract of suretyship, have been broken. These conditions must have been in the nature of an agreement or contract by and between Joyce and James E. Joyce & Co., the maker of the note, and the payee thereof, the receiver of the McCarthy-Joyce Co. The amended answer discloses no such state of facts, and no agreement or contract of any kind between Joyce and James E. Joyce & Co., as principals, and Whittemore as receiver, or either of them, at or before the time Joyce signed as surety is set out. A close analysis of the amended answer shows that the only facts brought to the attention of the endorsee were that there was an order of the Court to Whittemore as receiver, made before the execution of the note, in addition to obtaining a surety thereon, to retain a lien upon certain property; that this order was known to the bank; that it was not carried out by the receiver; that had it been carried out, the property upon which the lien was directed to be reserved was sufficient to pay the note, and the further alleged fact that Joyce relied upon the receiver carrying out said order of the Court. It is not asserted that the failure of the receiver to carry out the order was at the instance of or in any way attributable to any act of the defendant in error or to James E. Joyce & Co., the principal upon the note. It is not alleged that Joyce would not have signed the note as surety save for such order of the Court. It is not alleged that he agreed to become

surety upon an understanding or agreement, either with James E. Joyce & Co., the principal, or with Whittemore, receiver, that such order would be carried out. The only allegation made is that he believed it would be carried out, and believed that he would be protected thereby. Defendant in error is responsible neither for his belief, nor for his understanding, nor is he responsible for any failure or neglect of Whittemore, as receiver, to faithfully carry out the orders of the Court appointing him.

By attaching his signature to the note and delivering it to the principal maker, James E. Joyce & Co., without any conditions stipulated therein other than the absolute contract of suretyship as evidenced by his signature, plaintiff in error in effect gave credit to the note as and for an absolute promise of payment unconditional and without any notice, either to the payee or to the subsequent endorsees, of any stipulation or agreement not contained in the paper itself.

If, as a part of his agreement, the contract was that the alleged lien should be perfected before his promise to pay it became effective, it was his duty to see that it was so perfected. The note was given in payment for certain personal and real property, and ought not to have been delivered, and we may infer from the pleadings was not delivered, until the property had been transferred. Plaintiff in error, if he put the note in the hands of the principal maker to be delivered to the original payee upon the receipt of the property by the principal maker from the original payee, without any express restriction or condition, may be held to have consented to whatever his principal consented in the absence of fraud. He should not have permitted a deed which omitted the reservation of a lien upon the real estate to be accepted without such reservation, unless he intended to waive the lien. No fraud or deception is alleged, nor is it alleged that the note was delivered to the payee without the consent of

Joyce. The object of the Court in Arkansas in ordering the receiver to retain a lien on the real estate in addition to obtaining personal security for the note, was not thereby to protect the sureties, nor to preserve to them any rights, but was solely intended to protect the estate in the hands of the receiver, to-wit, the rights of the creditors of the McCarthy-Joyce Company. Neither the Court nor the receiver was the guardian of the sureties. It is their duty to look out for themselves. The orders of the Court are at all times under its own control, and may be modified in any way or manner the Court sees fit so long as vested and guaranteed rights are not interfered with. The Arkansas Chancery Court, had a right, at any time if it regarded the security for the funds sufficient, to order the release of any lien, and from all that appears in the pleadings, it may have done so in this case.

As illustrating our position in regard to plaintiff's liability we refer the Court to the following cases:

"1. *Negotiable Note—Notice.*

"One who receives a negotiable note, in the ordinary course of business, for a valuable consideration, executed by two or more, but with the understanding of the makers between themselves that it should not be delivered to the payee unless the signature of a third party was procured, can enforce its collection against those who signed it unaffected by any such understanding, of which he had no notice."

Davis v. *Gray*, 61 Texas, 506.

"*By the Court:* The note, made the foundation of this action is negotiable in form, bears no evidence on its face that it was ever expected to be signed by other persons than Turner and Co. and J. S. Davis, the appellant, and, if the averments of the answer are taken as true, was delivered by Turner & Company to Gray, in the ordinary course of business, for a valuable considera-

tion. This being true, it must be held that any agreement between Turner & Company and Davis, to the effect that the note should not be used unless Ellison & Kyle also signed it as sureties, cannot defeat the right of the plaintiff to recover on the note, unless it be shown that he had notice of the agreement between Turner & Company and Davis. The signing and delivery of the note by Davis to Turner enabled the latter to deliver it to Gray, who, in the absence of notice to the contrary, might rely upon the intention of all the parties whose signature was on it, to make with him the contract which the note evidenced. Brandt on Suretyship, 354–5; *State* v. *Potter*, 63 Mo., 212; *Russell* v. *Freer*, 56 N. Y., 67; 10 Lea Tenn., 124—*Jordan* v. *Jordan*.

"The only inquiry, then, in the case, is, does the answer aver such facts as would amount to notice to Gray of the intention of Davis not to be bound by the note unless Ellison and Kyle also signed it as sureties; such facts as would put a prudent man upon inquiry? We are of the opinion that the answer did not state such facts. It alleges that Hutchinson prepared the note and was to pass on the sufficiency of the surety for Gray; that Hutchinson proposed to take a note signed by Turner and Company, with Davis, Ellison and Kyle as sureties, that Turner took the note and signed it for his firm and also procured the signature of Davis thereto; that Ellison and Kyle declined to sign the note as sureties, after which Turner returned with the note to Hutchinson and informed him that the matter could not be consummated because Ellison and Kyle had refused to sign the note, whereupon Hutchinson proposed to receive the note as it then stood, to which Turner agreed and delivered the note, so far as it appears from the answer, without notifying Hutchinson of the fact that Davis had consented to be bound only in the event that Ellison and Kyle signed the note as sureties. *Facts thus stated were not sufficient as averments of notice to Gray;* for it cannot be presumed that Hutchinson had any knowledge of the agreement between Turner and Davis; and in the absence of something in the answer equivalent to an averment of that fact, it presented no defense to the action, and the Court below properly so ruled."

"P. signed a joint and several note, with G. as his surety, payable to a bank, but with the agreement between him and G. that the latter was not to use the note unless he obtained another surety on it. In violation of the agreement, G. procured the note to be discounted at the bank.

"Held, that this constituted no defence for P. on the note unless the officers or directors of the bank were aware of such an agreement."

The Passumpsic Bank v. *Elmer Goss et al.*, 31 Vermont, p. 315.

"*By the Court.* As between the plaintiffs and Page, who ought to be responsible for Goss' violation of his agreement with Page, that he would not use the note, unless Brown should be procured to sign it as co-surety?

"In the first place it is to be remarked that Page alone was in privity with Goss, so far as that agreement is concerned. In view of that fact, common principles would indicate that Page should stand responsible for the confidence reposed in Goss. The plaintiffs trusted to the paper, which was genuine and apparently perfected for the purpose intended to be served by it. They were not called upon to exercise any personal confidence as to any thing beyond the genuineness of the paper and the responsibility of the signers. See 12 Vermont 219, 222 and 348.

"If the case be considered with reference to the existing equities, it can hardly admit of doubt that they are with the plaintiffs; they have parted with their money in good faith upon paper that Page entrusted with Goss for the very purpose of enabling him to obtain that money of the plaintiffs and in a condition to enable him to use it for that purpose, without exciting any suspicion or suggesting any query as to the right to use it.

"If Page would have shielded himself from liability on that paper, as it was when he thus entrusted it to Goss, a practical and proper sense of fair dealing would seem to be that in some way he should have put the plaintiffs on their guard against taking it unless it should have been signed by Brown.

"In accordance with this view is an old and very uniform doctrine of the law that where through the fraudulent act of the third person one of two innocent parties must suffer, he who hath clothed that third person with the means of perpetrating that fraud must bear the loss. 4. N. H., 455; 15 East 442; 26 Vt. 112."

"It is no defense for the indorser of a note, that he endorsed it upon the express condition that it should also be indorsed by another person, where it does not appear that the indorsee knew the condition."

Bank of Missouri v. *Phillips*, 17 Mo. 29.

"It is no defense to an action by the indorsee of a note against the indorser, that the note was indorsed by the defendant without consideration, for the accomodation of the payee, and delivered to him for the purpose of being used to take up another note of the same parties, but that instead thereof, the payee passed the note to the plaintiff before its maturity, as collateral security for a pre-existing debt; unless it be shown also that the plaintiff knew of the special purpose for which the note was delivered to the payee."

Stoddard v *Kimball*, 4th Cushing, 604.

"*By the Court.* The case discloses no evidence tending to show that the plaintiff knew that the note was delivered by the defendant to Kelly and Reed, for the special and sole purpose of taking up another, and was by them, in violation of that trust, applied to a different purpose. The note was not over-due; on the contrary, it had several months to run, bore no evidence of being dishonored, and was taken by the plaintiffs for the valuable consideration, on giving up another available security. The facts relied on without proof affecting the plaintiff with notice of them, cannot, we think, be a ground of defense."

"1. When a security signs and delivers to his principal a negotiable note, under the condition that it shall not be delivered to the payee, or negotiated elsewhere, until some other person shall also sign the same as co-surety, and there is nothing on the face of the paper indicating that any other co-surety is expected to become

party to the instrument, and no fact is brought to the knowledge of the payee before he accepts the same, calculated to put him on his guard or which should induce inquiry, in such case the surety will be bound.

"2. The surety places the instrument perfect upon its face and before it is due, in the hands of the proper person to pass it to the payee, and the law justly holds that the apparent authority, with which the surety has clothed him, shall be regarded as the real authority, and as the condition imposed upon the delivery was unknown to the purchaser of the paper, therefore the benefits, of such condition shall not avail the surety."

Meriam v. *Rockwood*, 47th New Hampshire, p. 81.

"1. If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it shall not be delivered to the obligee, payee, or grantee, until some other persons who are agreed upon shall also execute the same, and the principal delivers the instrument without regard to the condition, and the obligee, payee, or grantee, has no knowledge of the condition, the delivery will bind the surety.

"2. A executed his promissory note payable to the order of B., and induced C. and D. to sign the note as sureties and re-deliver it to him, A., upon the promise that he would procure other persons named by them, also to execute said note. In disregard of his promise, A. delivered the note to B. without procuring the additional sureties agreed upon.

"Held, that the delivery to B. was absolute, and that the sureties were liable without regard to the condition."

Deardorff v. *Foresman*, 24 Indiana, 481.

"*By the Court:* It was also held in Taylor and Company v. Craig, 2 J. J. Marshall, 449, that a conditional delivery of a promissory note, by a surety in the note to his principal, did not make the instrument an escrow, but the plaintiff had the right to hold the surety responsible without regard to the condition he had imposed upon the principal at the time of delivery. *The Bank of the Commonwealth* v. *Curry*, 2 Dana, 142, recognizes this as law * * * * *

"The surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, and the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority, and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition should not avail the surety."

"It appears to be well settled, both by reason and by authority, that where one or two innocent persons must suffer by the fraud of a third person, he who entrusts the third person and places the means in his hands to commit the wrong must bear the loss. * * * * The wrong here was one which Brigg's vigilant regard for his own interest and safety could and should have avoided. In the case of the *Bank of St. Clairsville* against *Smith et al.*, 5th Ohio, page 222, the supreme court of this state held: that when a loss must be sustained by one of two persons through the fault of the third party in passing negotiable paper he who reposes the first confidence must bear the ultimate loss."

Selter v. *Brock*, 3rd Ohio State, page 308.

We call the special attention of the Court to the case of *Wornell et al.* v. *Williams, Administrator*, 19th Texas, 180, as being in all material respects parallel to the one at bar. The syllabus of that case is as follows:

"A plea by the sureties of the purchaser at an administrator's sale, in a suit on the note given for the purchase money, that they become sureties in consideration of the requirement of the statute, and of the order of Court, that a mortgage should be taken on the property by the administrator, to secure the note; that they would not have become such sureties but for that requirement, and the belief and assurance that it would be complied with; and that a mortgage was not taken by the plaintiff, in pursuance of a collusive and fraudulent understanding between the purchaser, who was at the time chief justice of the County, and the plaintiff; and that the purchaser soon afterwards conveyed the property (a slave) to some remote point and sold him; and

that, by the negligent and fraudulent conduct of the plaintiff, the securities required by law and the said order, have been omitted and lessened to the injury and detriment of these defendants. *Held*, to be bad on general demurrer.

"It does not become necessary in this case to inquire whether, in case of actual imposition, practiced upon the sureties of a purchaser at administrator's sale, by the administrator, in not taking a lien upon the property to secure the payment of the note given for the purchase money, they would be entitled to relief, as against the estate, or would be turned over to their recourse upon the administrator, personally for the redress of any injury they may have sustained."

The facts found by the Court were, that suit was brought by the appellee against the appellants on a joint and several promissory note signed by appellants, appellants pleading: "that the note sued on and set out in said petition was made and given by one James E. Glasscock, as principal, and these defendants as sureties for said Glasscock; that the consideration of said note, as is expressed therein, was a negro slave, named Samuel, belonging to the estate of Joseph and Martha Williams, the plaintiff's intestates; that said slave was sold by the plaintiff, in obedience to an order of the County Court of Rusk, aforesaid, sitting as a Court of Probate, at the November term, 1851; and that, at the sale, the said Glasscock became the purchaser of said slave for the amount of said note. Further answering, these defendants say, that the said order of sale directed the plaintiff to sell the slaves therein mentioned, upon a credit of twelve months; that he should take from the purchasers thereof two good sureties, as well as mortgages upon the property, as is provided by the statute in such cases made; and that said plaintiff failed, neglected and refused to take the required mortgage upon the said slave Samuel from the said Glasscock. Further answering, these defendants say, that they became sureties to

the note aforesaid, in consideration of the requirement made by the statute and said order that a mortgage should be taken upon the said slave; and they would not have become sureties but for that requirement, and the belief and assurance that it would be complied with. Further answering, these defendants say, that said Glasscock, at the time said order was made, and at the time of said sale and the confirmation thereof, was chief justice for the said County of Rusk; that they are informed, and believe, that the said mortgage was not taken by the plaintiff, in pursuance of a collusive and fraudulent understanding between the said Glasscock and the plaintiff; that said Glasscock, soon after his said purchase, conveyed said slave to some remote point and sold him; and that, by the negligent and fraudulent conduct of the plaintiff, the securities, required by law and the said order, have been omitted and lessened, to the injury and detriment of these defendants."

A general demurrer to this pleading was sustained in the Court below, and upon error the Supreme Court of Texas affirmed the decision of the lower Court. We quote the opinion of the Court in full:

> "WHEELER, J. The question is, whether there was error in the ruling of the Court sustaining exceptions to the plea, and excluding evidence in support of it; and we are of opinion there was not. The substantive matter of the plea is, that the defendants became sureties for the purchaser of the property, in the expectation and confidence that the administrator would perform his duty to the estate he represented, in taking the mortgage security required by law and the order of the Probate Court. There is no allegation that they were deceived or induced to become sureties by any false promise or representations of the plaintiff, or that any actual fraud was practiced upon them. There is a charge of fraudulent combination between the plaintiff and the purchaser, but whether it was for the purpose of defrauding the estate or the defendants, or whether it was intended or had the effect to deceive or injure any one,

is not alleged. There is no allegation of any actual deception, imposition or fraud practiced upon the defendants. The only ground for relief really disclosed by the plea is that the plaintiff did not perform his duty by taking the required additional security. The taking of that security should have been contemporaneous with the taking of the note upon which the defendants became sureties. (Hart. Dig., Art. 1181.) If they intended to become such only upon the taking of the mortgage upon the property, it became them, before giving their note, to see that the mortgage security was taken. There was nothing to prevent them from doing so. If, instead of taking that precaution, they saw fit to trust to the prudence and discretion of the administrator, the estate he represents cannot be made to bear the consequence of the want of their vigilance and care. They cannot make a hardship, against which they had ample power and opportunity to provide, a ground to relieve them from their obligation to the estate. On this ground, it is clear, the Court rightly adjudged the plea insufficient. It does not become necessary in this case to inquire whether, in case of actual imposition practiced upon them by the administrator, they would have been entitled to relief as against the estate, or would have been turned over to their recourse upon the administrator, personally, for the redress of any injury they may have sustained. That question may be considered when its decision becomes necessary. For the disposition of the present case it will suffice to say, the exceptions to the plea were rightly sustained, and consequently the evidence offered in support of it was properly excluded, and there is no error in the judgment.

"Judgment affirmed."

The answer in that case alleged as a defense all of the matters set up by Joyce in his amended answer herein, and alleged in addition that the sureties would not have signed the note but for the requirement of the statute of Texas, which was similar to that of the Arkansas statute, and their belief and the assurance to them that the requirements of that statute would be complied with. Even were this action an action by the payee of the note Whittemore against

Joyce, instead of an action brought by an innocent holder of the note, the facts alleged by Joyce would not, in our opinion, constitute a defense. The most that can be claimed from the allegations is that Whittemore, as receiver, was guilty of *laches* in not taking all of the security provided for by the order of the Court. The doctrine is well settled that mere *laches* on the part of a creditor will not deprive him of his action against the surety.

> "It is perfectly well settled, and has been very properly conceded in the argument, that a surety is not absolved by the want of diligence on the part of the creditor in regard to his demand against the principal debtor. A defense on the ground of mere *laches* would indeed be inconsistent with the relation of the parties. The obligation to pay is not in the event of the liability or unwillingness of the principal, but at all events, and under all circumstances, as much so as if he were the sole debtor. Such is the form of his obligation (unless specially qualified,) whether separate or joint, and such is the true intent and meaning; and it is founded upon a lawful and sufficient consideration, the credit given to the principal by his procurement."
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> *Humphrey* v. *Hitt*, 6th Grattan, page 523.

> "But the delivery of the fi. fa., to the sheriff is not security for the debt. It is only a step in the prosecution of the demand by legal process, as is equally true of the institution of the suit, or recovery of the judgment, and the issuing of the execution. And as the creditor owes to the surety no debt of active diligence, he may omit to bring suit, or dismiss it after it is brought; or after recovery of judgment, he may decline suing out execution, or to place it in the hands of the sheriff, or to cause it to be levied, or he may direct it to be levied only in a certain event. And why may he not recall or suspend the execution before it has been levied? In what respect does that differ substantially from any other negligent, or injudicious, or indulgent prosecution of his demand?"
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> *Humphrey* v. *Hitt*, 6th Grattan, page 526.

"The delivery of the execution to the sheriff, is not, properly speaking, a lien upon goods of the debtor; it is the levy which makes the lien; that, it is true, has relation, to some extent (i. e., as against *mesne* purchasers, but not as against other execution creditors,) to the delivery to the sheriff, but in like manner, and to like effect, and upon the same policy that the judgment lien on lands has relation to the first day of the term. There can be no relation of the judgment lien without a judgment, and so there can be no relation of a levy without a levy.

"If the creditor, by recalling or suspending an execution against a principal debtor, which has come to the hands of the sheriff, violates the rights of the surety, it cannot be because he thereby releases a security for the debt which he had obtained from the principal; but because he has failed to obtain such a security by a due course of proceeding; and that would be requiring of him an active and judicious diligence in the prosecution of his demand. And such required diligence would on the other hand encourage supineness and negligence on the part of the surety, who instead of performing his duties of paying the debt, or causing it to be paid by his principal, would be tempted to lie in wait for some slip or indiscretion on the part of the creditor, and even to stimulate his principal to solicit from the creditor an imprudent indulgence."

Humphrey v. *Hitt*, *id.*

In *The Farmers' Bank of Canton* v. *Reynolds*, 13 Ohio, 85, the Court held:

"A mere delay to pursue remedies or omission to enforce liens does not operate to discharge the surety. To work his discharge there must be some positive act of relinquishing sureties or release of liens."

In *Dye* v. *Dye*, 21 Ohio State, page 93, DAY, Justice, says:

"A creditor may, however, in many ways do that which, though it may not affect the liability of the principal, will exonerate sureties. In all such cases the discharge of the surety is based on some recognized and well-defined principle, and, in general, results from a

positive act of the creditor which operates to the prejudice of the surety. Passiveness on the part of the creditor will not discharge the surety, unless he omits to do, when required by the surety, what the law or his duty enjoins him to do, or unless he neglects, to the injury of the surety, to discharge his duty in any matter in which he occupies the position of a trustee for the surety."

"The discharge of the surety is not claimed in this case, by reason of any positive act of the creditor, not by reason of his neglect to prosecute the claim, after being required by the surety to do so by notice in writing, in accordance with the statute; nor, indeed, by reason of his neglect to comply with any requirement of the surety whatever, for, from aught that appears, the passiveness of the surety equaled that of the creditor. Nor did the creditor have anything in his hands, actually or constructively, in the nature of a trust. Then, upon the principles already so broadly stated, it would seem that the surety was not exonerated from liability on the note."

Referring to the language of Justice DAY in the present case, it appears that the passiveness of Joyce equaled that of Whittemore, nor did Whittemore have anything in his hands actually or constructively in the nature of a trust for Joyce.

"The withdrawal of an execution from the hands of a sheriff before a levy will not discharge a surety. Nor will an omission to revive a judgment by means of which the lien and the land was lost; nor discontinuance of steps to foreclose a mortgage. Daniel on Negotiable Instruments, Sec. 1311, p. 333; *Humphrey* v. *Hitt*, 6 Grattan, 509; *Sawyer* v. *Bradford*, 6 Ala., 572; *Heatherington* v. *Branch Bank of Mobile*, 14 Ala., 68."

"Mere indulgence to the principal debtor, at the will of the creditor, however long continued, and whatever may be the consequences, will not operate to discharge a surety, and the rule is the same, whether the indulgence is extended towards the principal debtor or towards a third person liable to the creditor upon a collateral security. The plaintiff, as surety for others, executed with them a note to the defendant for $2,000,

payable in one year. One of the principals at the same time assigned to the defendant as collateral security a bond and mortgage for a greater amount against third parties which fell due by successive installments after the maturity of the note. *Held*, That passive neglect of the creditor, there being no request on the part of the surety to enforce the bond and mortgage, afforded no ground to relieve the surety even in equity, although the neglect continued for a long time, and the value of the security was thereby lost. And although the creditor, after waiting two and a half years, commenced, without request, a foreclosure suit upon the bond and mortgage in season to have sold the mortgaged premises under his decree, and then to have docketed the decree for the deficiency, to have acquired a general lien upon property of the mortgagors sufficient to pay the debt or some part thereof, but conducted his proceeding so negligently that before he docketed his decree their property was encumbered by other liens to its full value, and the debt secured by the bond and mortgage became thereby lost; yet *held*, that the plaintiff as surety was entitled to no relief at law or in equity."

Schroeppell v. *Shaw*, 3 N. Y., 416.

"*By the Court:* The ground upon which the plaintiff claims that he is, in equity, entitled to be discharged from his liability, is the alleged gross negligence of the defendant in the collection of the bond and mortgage assigned to him as collateral security for his debt. In the consideration of this question, I shall, at least for the present, assume it to be true, as the plaintiff alleges, that by the exercise of promptness and vigilance, the defendant might have secured the payment of the bond and mortgage and thus have relieved the plaintiff from his liabilitiy. In considering the obligation of the parties to each other, as creditor and surety, it is to be borne in mind that the plaintiff had, by signing the note, guaranteed that his principals should, in one year from the date of the note, pay the amount with interest to the defendant, or that he would himself be liable for its payment. Before the first installment upon the bond and mortgage had become payable, the note had become due, and the plaintiff as well as his principal was in

default. The right of the defendant to *sue the plaintiff for the recovery of the note at any time after it became due will not be denied.* Suppose a suit had been brought and judgment had been recovered, before the alleged default of the defendant in not securing the payment of the bond and mortgage had occurred, can it be pretended that the subsequent neglect of the defendant could have the effect of an equitable discharge of the plaintiff's liability to pay the judgment? It seems to me that to sustain this bill it is necessary to violate one of the cardinal principles of equity. The plaintiff was the party first in default. If he had performed his obligation to the defendant, he would have had control of the bond and mortgage before any part of it became due. There was no time, after the first installment upon the bond and mortgage became due, when the plaintiff was not in default, and liable to be sued for such default. To allow him to take advantage of any want of diligence of the defendant in collecting the bond and mortgage, under such circumstances, seems very much like allowing a man to take advantage of his own wrong. If the defendant was guilty of negligence, the plaintiff was guilty of the positive omission of duty. The defendant was under no higher obligation to collect the bond and mortgage, than the plaintiff was to pay the note and take the bond and mortgage himself.

"But let us consider more attentively what constitutes such gross negligence as will operate to discharge a surety, when he is not himself in default. A surety has an undoubted right, upon the payment of the debt, to have the full benefit of all the collateral securities which a creditor has taken as an additional pledge for his debt. 'It is hardly possible,' said Lord BROUGHAM, in 3rd M. & Keen, 190, 'to put this right of substitution too high.' 'The surety,' says Chancellor KENT, 'by his very character and relation of surety, has an interest, that the security taken from the principal debtor should be dealt with in good faith and held in trust, not only for creditors' security, but for the surety's indemnity. The creditor must do no willful act either to poison it in the first instance, or to destroy or cancel it afterwards.' 'But this qualification should be added,' says STORY, 'that a mere omission by the creditor to collect the debt

due of the hypothecated property, so that it is lost by his *laches*, will not discharge the sureties. The creditor must be guilty of some wrongful act, as by a release, or fraudulent surrender of the pledge in order to discharge the surety.' See 1st Story, Equity, paragraphs 501–639. Thus, it will be seen, that in reference to collateral securities, the rule is the same as in reference to the collection of the debt of the principal debtor. The creditor is under no obligation of active diligence for the protection of the surety so long as the surety himself remains inactive. Until the surety moves in the matter, it is enough that the creditor holds himself in readiness to transfer to him, when he applies, all the securities he holds, that he may have the benefit of such securities in aid of his own responsibility. * * * I have thus noticed in detail all the cases cited by the plaintiff's counsel to show that upon the facts presented in this case the plaintiff should be relieved from the payment of the judgment against him, and have examined the principles upon which those cases were decided, that it may be apparent that, in no single instance, has it ever been held that the mere passiveness of the creditor, in the collection of his debt, either of the principal debtor or from collateral securities held by him, is sufficient ground for discharging the surety from his liability. No rule is more uniformly recognized than that mere indulgence at the will of the creditor, however long, or whatever may be the consequences, will not operate to discharge the surety. I think it may be safely added, that this rule is equally applicable whether the indulgence is extended towards the principal debtor or towards a third person liable to the creditor upon a collateral security. The criterion by which to determine in any and every case, whether a creditor has done, or omitted to do, anything which will have the effect to exonerate the surety, is stated, as I think, with perfect accuracy by Judge STORY, as follows:

"If a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act when required by the surety which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit

brought against him, if not at law, at all events in equity. 1 Story, equity, par. 325.

"After a very diligent examination of the authorities bearing upon the question, I feel great confidence in asserting that a surety has in no case been held to be discharged by the act or omission of the creditor, where such act or omission has not been within the terms of this rule."

"1st. When the holder of a promissory note receives from the maker a conveyance of certain property as collateral security for the payment of the note, the law implies no contract on the part of the creditor to proceed on the collaterals before he can sue the surety. The surety may at any time after the debt becomes due and owing, discharge it and take the collateral.

"2nd. The rights of the parties are not affected by the fact that the collaterals have depreciated between the time of the maturity of the debt for payment of which they were pledged, and the commencement of suit against the surety."

Brick v. *The Free Hold National Banking Company*, 37 New Jersey Law, page 307.

"*By the Court.* The defendant in this case is sued as endorser of a promissory note. The defense is, that the plaintiffs, the holders of the note, received from the maker a conveyance of certain property as collateral security for the payment of the note, and that because of their failure to sell the collaterals and appropriate the proceeds of the sale to the liquidation of the debt, coupled with the fact that the property held as collateral, had somewhat depreciated in value between the time of the maturity of the note and the commencement of the suit, the right of action as against the defendant, who is an accommodation endorser, is lost. This proposition cannot be maintained. It is well settled that mere delay by the creditor to sue the principal debtor will not discharge the surety, for the obvious reason that the surety may at any time discharge his obligation to the creditor, and thus make the principal his debtor. The same rule holds when collaterals are pledged by the principal debtor. The surety may at any time after the debt

becomes due and owing, discharge it and take the collaterals. The law implies no contract on the part of the creditor to proceed on the collaterals before he can sue the surety. Nor are the rights of the parties affected by the fact that the collaterals have depreciated between the time of the maturity of the debt, for payment of which they were pledged, and the commencement of suit against the surety. These principles are recognized as sound law by the Court of Appeals in New York and in the well considered case of *Schroeppell* v. *Shaw*, reported in 3rd New York, 446."

"Mere forebearance by the creditor to the principal, however prejudicial to the surety will not discharge the surety."

1st sec. syllabus *Pitts. Ft. Wayne & Chicago Railway Company* v. *Shaeffer*, 59 Pa. St., 350."

"Mere *laches* on the part of the obligee or creditor, for non-performance of some act which might prevent loss to the surety will not, in the absence of some express covenant or condition, discharge a surety. To be available to him as a defence, the neglect must be of some positive duty owing to him."

1st sec. syllabus in *Board of Supervisors of County of Monroe* against *Otis*. 62 N. Y., 88.

"*By the Court.* Judge Gardner, the learned referee in this case, suggests what seems to be the true rule as between sureties and obligees, that mere passive negligence or *laches* of the obligee or creditor, mere non-performance of some affirmative act, which if performed might prevent loss to the surety, will not, in the absence of some express covenant or condition to that effect, discharge a surety, and that the neglect of duty which is available as a defense for a surety, must be of some duty owing to the surety, and not to others; some positive duty undertaken in behalf of, and for the benefit of the surety. * * * * * It was held by this Court in *McKechnie* against *Ward*, 58 N. Y., 341, decided in October, 1874, following the unbroken current of authorities, that the surety was not discharged by mere non-action of the creditor, or his omission to take measures for collection of the debt from the principal.

"A creditor who lets the means of satisfaction slip from his hands, discharges his debtor's surety, but he must have the means actually in his hands, or at least a specific lien on it. Permissive supineness will not do it. In the *United States* v. *Simpson*, 3 Penn. Rep., 459, the surety was not discharged, though the creditor had suffered the lien of the judgment against the principal to expire. That was thought to be a different thing from impairing a security by a positive act, the surety and the creditor standing in equal want of equity. Had the surety in this instance required the creditor to proceed on his execution, the case would have been different, but it was his business to look after his own interest. *Morrison* v. *Hartman*, 2nd Harris, p. 56."

See also:

Thompson v. *Hall*, 45 Barb., 214.
U. S. v. *Simpson*, 3 P. & W., 437.
Kindt's Appeal, 102 Pa. St., 441.
Winton v. *Little*, 94 Pa. St., 64.
Mundhorff v. *Singer*, 5 W., 172.
Allen v. *Brown*, 124 Mass., 77.
Hunt v. *Brigham*, 2 Pick, 581.
Horne v. *Bodwell*, 5 Gray, 457.
Deal v. *Cochran*, 66 N. C., 269.
Camp v. *Boswick*, 20 Ohio St., 337.

The pleadings herein show that there was abundant opportunity for Joyce, using ordinary diligence, to have protected himself. He could have paid the note when due and proceeded against his principal. The note became due in March, 1896. The answer shows that James E. Joyce and Company, in July, 1897, over a year after the note had become due, still held a part of the real estate upon which it is claimed the receivers should have retained a lien, and upon his own statement he could have enforced his rights against such real estate. If he has suffered at all, he has suffered by his own negligence in not seeing to it that the receiver carried

out the order of the Court and if any negligence is chargeable to the receiver, his remedy is against the receiver as well as his bondsmen individually.

Considering now some of the cases cited by counsel for plaintiff in error we find :

The language of the syllabus in the case of *Hickok* v. *Farmer's Bank*, 35 Vermont, 476, differs so very materially from the construction put upon it in plaintiff's Brief that we desire to call attention to it.

> "An assurance given by the payee of a promissory note to the surety thereof, at the time of its delivery, without which assurance the surety would not have signed the note, that if not paid at maturity the payee would immediately proceed to collect it out of the principal, accompanied by the fact that the payee suffered the note to remain unpaid for more than a year after its maturity without taking any steps to collect it, or notifying the surety of its non-payment, until after the failure of the principal, notwithstanding it might during that time have been collected of the principal, and the further fact that the principal relied on this assurance, and in consequence thereof omitted to take measures to secure himself, constitute an equitable estoppel against the enforcement of the note against the surety, and relief will be granted him in that respect by the Court of equity."

The plaintiff in error does not claim that any assurance was given him by the payee of the note he signed as surety at the time of its delivery, or at any other time, without which assurance he would not have signed the note.

In *Jones* v. *Kerr*, 30 Georgia, 93, the bill alleges that Jones & Cox were induced to become sureties for one A. J. Williams on a promissory note, payable to Kerr & Hope, which note was given in lieu of, or payment of, *fi. fa.* held by Kerr & Hope against Williams, and was signed by said Jones & Cox as his securities under the agreement, and upon the condition that said *fi. fa.* should be assigned by said Kerr & Hope to them.

The Supreme Court of Georgia therein held:

> "If a plaintiff in a *fi. fa.*, taking a new note for his judgment debt, with security, undertake to deliver the original execution to the securities for their indemnity, and fail to do it, and who in consequence thereof lose the money, they are entitled to their discharge."

The facts in this case bear not even the slightest resemblance to the facts in that case, nor can the declaration of the law by that Court have any application to this case.

In *Burr* v. *Boyer*, 2 Neb., 265, we cheerfully quote from the opinion of the Court:

> "From what has been said, it will be understood that any liability which might fall upon the plaintiff in the premises would result from his omission to file the mortgage, rather than from any failure to satisfy his claims out of the mortgaged property."
>
> "This latter he was not bound to do upon his own motion. Story Eq. Jur., Sec. 501. His duty, in the first instance, was to make effectual the security given, to preserve it, to await the maturity of the note. Then the duty of the defendant Boyer arose. It was for him then to pay the note, unless the conduct of Burr had destroyed the security on which he was entitled to rely. But from all that appears here at that time the property may have been intact and in possession of Mitchell. It is claimed now, nearly one year after the defendant Boyer's obligation arose, that the property is disposed of. It does not follow, nor is it at all probable, that such was the case at the time when he, under the law of his contract, should have paid the note. If it is the fact, it was the duty of the defendant in the Court below to make it appear. The final presumption is to the contrary, however, but the defendant cannot go into a Court and invoke aid of a rule of law granted in equity; he must not only show that the plaintiff has been guilty of the wrong, but that he himself is free from fault. For this reason the first defense is insufficient."

This language seems most appropriate to the facts as they appear in the answers of the defendant in the Court below, and would justify sustaining the demurrers to the same even if the action were between Joyce and the original payee of the note sued on.

In the case of *The City Bank* v. *Young*, 43d New Hampshire, 457, the principal had given the mortgage to the bank as collateral security for the note, and the bank had subsequently placed the property in the hands of the mortgagor, who was the principal of the note, and permitted him to sell the same. He was then insolvent, and appropriated the greater part of the proceeds. Under such circumstances the Court properly held, when a creditor disposed of personal property mortgaged to him by the principal as collateral security, he is responsible to the surety for ordinary care and prudence in the sale and the application of the proceeds.

In *Wulff & Billing* v. *Jay*, 7 Queen's Bench, page 761, COCKBURN, C. J., says:

> "This is an action brought against the defendant, as surety. It appears that as part of the transaction between the principal creditors and the debtors, there was to be a mortgage of the plant, fixtures, and things upon the debtor's premises, by bill of sale as security for the principal debt. The debtors were to remain in possession of the things thus mortgaged until default, and the creditors were to have power, in the event of the default in the payment of the installments of the debt, which were to be paid until the bill of sale, or in the event of the interest, which was to accrue from time to time, not being paid, to enter and sell the things thus assigned, upon giving a month's notice."
>
> "Now it appears that in the month of February, interest first became due, and that the interest was not paid, and it remained unpaid until the month of August, when the debtors became bankrupt. It further appears that the insolvent condition of the debtor's affairs was plain, and that bankruptcy was imminent and had been impending for some time before it actually took place;

and it further appears that one of the creditors was cognizant of that fact, and was afterwards, and when the bankruptcy took place, solicitor to the proceedings in the bankruptcy, and was therefore perfectly aware of the bankruptcy being imminent, notwithstanding he took no steps to protect the bill of sale by registration, or to enter and take possession of the effects."

It was *held:*

"That the plaintiffs, by their omission both to register the deed and to seize the property assigned to them on default of payment of the interest, deprived themselves of the power to assign the security to the surety, and that owing to their *laches* he was discharged to the amount that the goods were worth."

The above case differs from the one under consideration in this, besides the action being between original parties to the note, it appears that the mortgage for the security of the principal debt was actually given to the creditors; that default was made in the payment of interest on the note; that the principal creditor neglected to avail himself of the express provisions of the mortgage to secure his debt; that he was guilty of this neglect knowing that the principal debtor was insolvent. Whereas, there is no averment in the answer to which we have demurred, of the insolvency of the principal maker of the note, nor of the inability of said maker to have paid the note to the surety at any time after it became due, if he had performed his duties and paid the note, and promptly proceeded against the maker.

In the case cited from 6th Heiskell, 2, *Gillespie* v. *Darwin*, the Court decided upon the following state of facts:

"*Principal and surety: Payment.* A was the maker, and B the surety, of the note held by C. A died, and his administrator, having suggested the insolvency of his estate, filed a bill in the Chancery Court to remove the administration to that Court, and to have a sufficiency of the land sold to pay the debts, an order was made and published requiring creditors to file their

claims. Thereupon C filed his note with the clerk and master. A portion of the land was sold by decree of the Court, and a fund sufficient to pay all debts collected before the war. C did not demand payment of the clerk, and nothing was paid upon his note; but after the war he sued B, as surety. Held, that the surety was discharged."

In the next case cited, *Watts* v. *Shuttleworth*, 5 Hurdlestone and Norman, 235, the full quotation is as follows:

"By articles of agreement, H. agreed with W. (the plaintiff) to complete certain fittings for a warehouse for 3,450 pounds, to be paid by installments during the progress of the work. This contract contained a stipulation: 'That W. (the plaintiff) shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, *and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract.*' By agreement recited in part in the contract, the defendant agreed with the plaintiff to guaranty the due performance of the works by H. The agreement was to be signed, and was in fact signed, at the office of the architects, and the defendant stated that a clerk of the architects told him that he incurred no risk in consequence of the stipulation as to the insurance, and that therefore he signed the guaranty. The plaintiff advanced 1,800 pounds to H., during the progress of the work, after which the fittings to be valued at 2,300 pounds, while still unfinished, were destroyed by accidental fire in the wareshop of H. The plaintiff had not insured the fittings. H. became insolvent and never repaid the 1,800 pounds, or any part of it. The plaintiff was compelled to pay a sum greater by 241 pounds than the original contract price, to another person to complete the work contracted for."

Upon such a state of facts the Court held:

"That the plaintiff ought to have insured the fittings, and having omitted to do that which his duty toward the defendant required him to do, and which, if he had done, the defendant would have been relieved to the extent of the insurance, the defendant was discharged."

The case in the 14th American Reports, page 389, is one wherein the suit was upon the official bond of one Hoyle, as Treasurer of Lynn County. One of the sureties, Bealls, signed the bond on the condition that the principal would also procure the signature of L. thereto as surety, and that he was to retain the bond in his hand as an escrow, unless the other party should also execute it as security. Hoyle never procured the signature of L., whose name was signed to the bond without his knowledge or consent, and the bond was delivered to Lynn County without the knowledge or consent of the defendant, Bealls. The Court says:

> "When a principal, not acting as agent of the creditor, fraudulently procures the execution of a bond by sureties, the remedy of the sureties in such case is against the principal, and not the creditor who did not participate in the fraud. But this is not at all that case. Here there was no valid execution of the bond at all. The delivery was conditional, and it could not become the bond of the surety till this condition was performed."

Holt v. *Bodet*, 18 Pa. State, 107, is a case wherein the assignee of a bond upon which he had judgment entered, released from its lien real estate of the principal debtor, thereby discharging the surety to the extent of the value of the property so released.

Cummings v. *Little*, 45 Maine, 187, is one in which the payee of promissory notes held a mortgage over one of the defendants upon personal property, and afterwards, without consulting the other defendants, who were in fact sureties on the notes, he discharged the mortgage. And *Baker* v. *Briggs*, 19th American Decisions, 311, is the same kind of a case.

In every case cited by the plaintiff in error, which seems favorable to him, there was a positive act of the creditor in the parting with legal or equitable securities which the latter might have held for the benefit and protection of the surety. Such a state of facts is not presented in the answers in this case.

ARGUMENT.

SECOND DEFENSE.

This defense is, that the First National Bank of Little Rock, at the time of the assignment of the McCarthy-Joyce Company, of all its real and personal estate to the said C. H. Whittemore, had in its possession for collection some sixteen promissory notes that had been given to the McCarthy-Joyce Company, and that the Bank was a preferred creditor of the McCarthy-Joyce Company to a large amount. The claim of Joyce, plaintiff in error, is, that these notes were included in the inventory and order of sale, and constituted a part of the consideration for which the note sued on herein was given; that he, Joyce, signed said note as surety upon the understanding and faith that the said receiver of the McCarthy-Joyce Company would deliver to the principal maker of said note these sixteen promissory notes along with the other personal and real property. He further claims that these sixteen notes, although they amounted in the aggregate to only $11,000, were sufficient in value to pay the note herein sued upon, amounting to $9,000 and interest, as well as the other note given for a part of the deferred payments, amounting to $9,000, and interest; that the First National Bank of Arkansas, and the said Sterling R. Cockrill as Receiver thereof, have wrongfully and illegally refused to deliver said notes or the proceeds of such as have been collected to the said James E. Joyce & Co. The essence of this defense is, that by the alleged wrongful withholding of these sixteen promissory notes from the principal maker of the note sued on herein, the consideration therefor has failed, and that he, Joyce, as surety thereon, is thus discharged from his obligation. The amended answer filed herein shows that these sixteen promissory notes were never in the possession of Whittemore as Receiver of the McCarthy-Joyce Company

and that the note herein sued upon was given in part payment for real estate, personal property and choses in action which were in his hands of the value of $38,000. It is impossible to discover the method by which plaintiff in error separates these particular sixteeen promissory notes from the great mass of property conveyed at that time, and by what method he fixes them as the sole consideration for the note upon which he is sued herein. How then, can it be correctly said, "A consideration of the note in controversy has failed?" "A partial failure of the consideration is a good defense *pro tanto*, but such part as is alleged to have failed must be distinct and definite, for only a total failure, or the failure of a specific and ascertained part can be availed to by way of defense."

Daniel on Negotiable Instruments, Vol. 1, p. 203.

While the amended answer admits that these sixteen promissory notes were in the possession of the First National Bank of Little Rock, Arkansas, for collection, "said Bank being a preferred creditor of the McCarthy-Joyce Company for a large amount at that time," no claim is made that said indebtedness to the Bank has ever been paid. Hence, it is admitted to be still outstanding against any collections that may be made on the said sixteen promissory notes. The Bank had and still has a lien upon them for the indebtedness due it from the McCarthy-Joyce Company. It is doubtful whether this defense was intended to be taken seriously, especially as counsel for plaintiff in error must have known that the question involved therein has already been determined adversely to the principal maker of the note sued on herein, in the highest Court of the State of Arkansas before the amended answer was drawn. See

Cockrill v. *Joyce*, 62 Ark., p. 216.

It is not denied that the note sued upon herein came into the hands of the defendant in error by purchase for full value before maturity, in the due course of business and in good faith. These elements are all that was necessary to entitle the holder to the immunities granted by the law merchant.

> "The failure of consideration, like want of consideration, is no defense to commercial paper in the hands of a *bona fide* holder for value."
>
> 2d Randolph on Commercial Paper, Sec. 557, and authorities there cited.

> "In an action by a *bona fide* holder of a note taken before due against the maker, the consideration cannot be inquired into if the instrument be not in its creation void."
>
> *Baker & Robinson* v. *R. & H. Arnold*, 3 Kaines, 279.

> "But the want of consideration, or the failure thereof, can not be pleaded in a suit brought by an indorsee against the maker of a note, by an indorsee against a prior, but not his immediate indorser, nor by the payee against the acceptor of a bill, as a general rule. They are regarded as remote parties to each other, and between such parties two distinct considerations must be inquired into in order to perfect a defense against the holder. First, a consideration which the defendant received for his liability; and second, that which the plaintiff gave for his title. And if any intermediate holder gave value for the instrument, that intervening consideration will sustain plaintiff's title."
>
> Daniel on Negotiable Instruments, 4th Ed. sec. 174, p. 190.
>
> Byle's on Bills, 236.
>
> 1st Parsons Bills and Notes, 192.
>
> *Hoffman* v. *Bank of Milwaukee*, 12 Wallace, 191.

If Joyce, as he says in his amended answer, signed the note herein sued upon for James E. Joyce and Company, as surety, upon the understanding and faith that by this purchase James E. Joyce and Company would obtain title to

notes held by the bank and not within the control of the Court or of its receiver, it was a mistake of his, and for which the bank was at that time in no wise responsible, nor is it in any way responsible now. The receiver of the McCarthy-Joyce Company was not entitled to the possession of these notes. And neither was the James E. Joyce Company until the indebtedness due the bank was paid. The law on this subject is well settled, and is thus stated by a recent writer:

> "A banker has a lien on all securities of his debtor in his hands for the general balance of his accounts unless such a lien is inconsistent with the actual or presumed intention of the parties. A lien attaches to notes and bills and other business paper which the customer has intrusted to the bank for collection, as well as to his general deposit account. And so, if the securities be deposited after the credit was given, the banker has a lien for his general balance of account, unless there be an expressed contract, or circumstances that show an implied contract inconsistent with such lien."
>
> 1st Jones on Liens, 2nd Ed. sec. 244.
>
> *Kelley & Co.* v. *Phalen*, 5th Dillon, C. C. R., 228.
>
> *Reynes* v. *Durmont*, 130 N. Y., 392.
>
> *Bank of Metropolis* v. *New England Bank*, 1st Howard, 239.
>
> *Cockrill* v. *Joyce*, 62 Ark., p. 216.

To the latter case we invite the careful attention of the Court, as it not only clears up the question involved in this defense, but also throws some light on the value of the first defense.

JOSEPH H. OUTHWAITE,
TALFOURD P. LINN AND
OUTHWAITE, LINN & THURMAN,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 83.—October Term, 1900.

John Joyce, Plaintiff in Error, *vs.* H. F. Auten, successor of Sterling R. Cockrill, as Receiver of the First National Bank of Little Rock, Arkansas.	In error to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 24, 1900.]

On March 20, 1893, the plaintiff in error, as a surety, executed with his principal the following note:

"Three years after date, we, or either of us, promise to pay to the order of C. H. Whittemore, as receiver of the McCarthy & Joyce Company, the sum of nine thousand ($9,000.00) dollars, with interest at six per cent. per annum from date till paid. This is one of the three notes executed for purchase money of the assets of the McCarthy-Joyce Company, this day sold to James E. Joyce & Company.

James E. Joyce & Co.
John Joyce.

"Little Rock, Arkansas, March 20, 1893."

This note was transferred before due for value to the First National Bank of Little Rock, which afterwards went into the hands of a receiver. Such receivership was changed, and the defendant in error is the present receiver. The note not having been paid at maturity, this action was brought in the Circuit Court of the United States for the Southern District of Ohio. The defendant answered, pleading two defenses, as follows: First, that the McCarthy & Joyce Company, a corporation, of Little Rock, Ark., became involved, and on or about January 16, 1893, assigned its property to one C. H. Whittemore, as assignee, for the benefit of creditors; that such assignment was confirmed by the chancery court of the county, and the assignee appointed receiver; that thereafter the receiver was directed by said court to sell all the property belonging to the insolvent company; that such sale was made on April 20, 1893, to James E. Joyce & Company, the principal in this note, for $38,200, all of which has been paid by the purchaser, except this note and another of like date and amount, signed by another party as surety. The answer then proceeds as follows:

"Defendant further says that at the time the order for the sale of said real and personal property was made it was expressly provided and ordered by the court that the said receiver was, in addition to obtaining endorsers or sureties upon the notes given for the deferred payments, to retain and

reserve a lien, under the statutes of the state of Arkansas, upon all the real and personal property so ordered to be sold, and this defendant, knowing that said property was more than sufficient in value to pay all the deferred payments as provided for in said sale, and relying upon the faithful execution of said order by said receiver, became surety upon said note described in the petition herein. Defendant further says that said receiver, after having received said note, in violation of the order of the court, and in violation of the rights of this defendant, negligently and wrongfully failed to retain or reserve a lien upon said property, real and personal, and improperly conveyed all of said real and personal property to the said James E. Joyce & Company, free and clear of any lien whatsoever. The defendant further says that said James E. Joyce & Company, after so receiving said property, have sold and conveyed all the personal property and nearly all the real estate to third persons, who were ignorant of said order of court, made for said sale; whereby the lien which ought to have been retained and reserved has been lost; and the said defendant further says that said property was sufficient in value to have fully paid said note, as well as the other note given for the deferred payments, and the said First National Bank of Little Rock, Arkansas, as well as its receiver, having received the said note with notice of the foregoing facts, this defendant is discharged and released from the said note, he asks that the plaintiff be compelled to surrender said note and that the same be canceled by order of this court."

The second defense was that, when the McCarthy & Joyce Company made its assignment, a part of the property assigned consisted of certain promissory notes, the dates, amounts and payers of which were specifically described; that such notes at the time of the assignment were in the possession of the First National Bank of Little Rock for collection; that such bank was a preferred creditor to a large amount; that all the property of said McCarthy & Joyce Company, including such notes, was ordered sold, and that the sale was made for $38,200, as heretofore stated; that thereafter the First National Bank and its receivers declined to surrender the notes, or the proceeds of such as had been collected; that the purchaser, James Joyce & Company, paid to the receiver of the McCarthy & Joyce Company $20,200, and that the notes retained by the bank and its receiver were of sufficient value to pay the unpaid purchase price, both this note and the other note heretofore described. A demurrer to such answer was sustained, and judgment entered in favor of the plaintiff, which judgment was affirmed by the Court of Appeals of the Sixth Circuit, (35 C. C. A. 38,) and thereafter this writ of error was sued out.

Mr. Justice BREWER delivered the opinion of the Court.

The surety, defendant below, now plaintiff in error, did not in his answer aver that the note was not given for value, or that either he or his principal had paid it. His defenses were that he was discharged from liability, first, by the conduct of the payee; and, second, by that of the plaintiff.

With regard to the first defense, we may put the plaintiff out of consideration, and enquire whether the defense would have been good if the payee had not transferred the note, but had himself brought the action. For the plaintiff, though charged to have had knowledge of the facts, is, if in no better, certainly in no worse, position than the payee would have been.

That defense was in substance that the receiver was directed in making a sale to retain a lien, as well as to take personal security. The surety knew that such order had been made, expected that it would be complied with, and signed as surety, relying upon compliance; but there is no allegation that he ever notified either his principal or the receiver that he signed upon that condition. So far as the paper disclosed it was an absolute promise on the part of the principal to pay so much money, and an unconditional guarantee by the surety of such payment. Could the principal defend against an action on this note on the ground that no lien was retained upon the property sold by the receiver and purchased by him? Clearly not. But the paper puts both principal and surety on the same plane. If the surety has any other defense it must be because the writing does not fully express his contract. He says that it does not express the contract he intended to make, but no conditions are named. If he wanted to attach conditions to his guarantee he should have stated them in the writing, or, at least, given notice of them to the payee, the other party to the contract. Even if he had told his principal that he signed only upon a condition, such notice would not bind the payee unless communicated to him; much less when, so far as the answer discloses, he never notified either the principal or the payee, but, relying upon the payee's complying with the order of the court, signed an apparently unconditional promise. The receiver was not acting in behalf of the defendant. His duty was to the estate and its creditors. True, he ought, in compliance with the order of the court, to have retained a lien, but his failure so to do was a breach of duty to the estate in his hands, for which failure the estate and its creditors might hold him responsible. Undoubtedly, one may not after receiving the promise of a surety release other securities which he holds to the prejudice of the surety, but a release of security after the receipt of the promise of a surety is very different from a failure to take more security than such promise. It would seem from the allegations in this answer that the surety signed supposing that he was incurring no liability; that his unconditional promise that the principal should pay the note meant nothing, and this because he expected that other primary and sufficient security would be taken. And yet he gave no notice that such was the condition upon which he signed as surety, and did nothing to compel compliance by the receiver with the order of the court. He was willing to make his unconditional promise and take the chances of the receiver doing as he

was ordered, and now seeks to release himself from that promise simply because of the receiver's neglect.

There are many authorities sustaining the proposition that a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee; or, in other words, that the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise. See, among other cases, *Goodman* v. *Simonds*, (20 How. 343, 366;) *Dair* v. *United States*, (16 Wall. 1;) *Merriam* v. *Rockwood*, (47 N. H. 81;) *Selser* v. *Brock*, (3 Ohio St. 302, 308;) *Passumpsic Bank* v. *Goss*, (31 Vt. 315;) *State* v. *Potter*, (63 Mo. 212;) Baylies on Sureties and Guarantors, 440; 2 Brandt on Suretyship and Guaranty, sec. 407. Without citing other of the many authorities to the same effect, it may not be out of place to refer to one decision which presents the question in almost precisely the same form that it is presented here, *Wornell* v. *Williams*, (19 Texas, 180.) In that case an administrator sold property of the estate, the order of sale directing that he take from the purchaser two good sureties as well as mortgages upon the property, as provided by the statute. He took the sureties but failed to take the mortgage. The sureties, when sued, setting forth these facts, averred in their answer:

"Further answering, these defendants say that they became sureties to the note aforesaid in consideration of the requirement made by the statute and said order, that a mortgage should be taken upon the said slave; and they would not have become sureties but for that requirement, and the belief and assurance that it would be complied with."

There was no allegation of notice to the administrator of the condition upon which they signed. The court, overruling the defense, said:

"There is no allegation of any actual deception, imposition or fraud practiced upon the defendants. The only ground for relief really disclosed by the plea is that the plaintiff did not perform his duty by taking the required additional security. The taking of that security should have been contemporaneous with the taking of the note upon which the defendants became sureties. (Hart. Dig. Art. 1181.) If they intended to become such, only upon the taking of the mortgage upon the property, it became them, before giving their note, to see that the mortgage security was taken. There was nothing to prevent them from doing so. If, instead of taking that precaution, they saw fit to trust to the prudence and discretion of the administrator, the estate he represents cannot be made to bear the consequences of the want of their vigilance and care. They cannot make a hardship, against which they had ample power and opportunity to provide, a ground to relieve them from their obligation to the estate."

The demurrer to the first defense in this answer was properly ~~overruled~~ sustained.

The second defense is substantially that the bank was a creditor of the insolvent firm; that it was a preferred creditor; that it had certain notes for collection; that those notes were included in the sale but were not

turned over to the purchaser, and that they were of sufficient value to offset the amount due on this note. It is not alleged that the debt due from the insolvent to the bank had been paid by collection of those notes or otherwise, but the defense is rested on the averment that notes thus deposited and unpaid were of sufficient value to pay the unpaid purchase money. It is familiar law that a bank receiving notes for collection is entitled, in the absence of a contract expressed or implied to the contrary, to retain them as security for the debt of the party depositing the notes. (1 Jones' Liens, 2d ed. §. 244; *Bank of Metropolis* v. *New England Bank*, 1 How. 234, 239; *Reynes* v. *Dumont*, 130 U. S. 354, 391, 392.) But if such banker's lien existed the sale transferred nothing but the equity in those notes after the payment of the debt secured by their deposit.

The fact, as alleged, that the bank, although a preferred creditor, accepted the assignment, cannot be construed as an admission that the bank waived its lien on the notes deposited with it for collection. Nowhere is there a suggestion that the bank either directly or indirectly consented that the assignment should operate to divest itself of its lien and transfer the notes in its hands to the receiver discharged from such lien. While the amount of the indebtedness of the insolvent to the bank is not in this answer disclosed, counsel refer us to the case of *Cockrill* v. *Joyce*, (62 Ark. 216,) a case decided before the commencement of this action, in which the purchaser, the principal debtor, sought to defeat the title of the bank to these notes and compel an inclusion of them *in solido* in the sale to the purchaser discharged of any lien of the bank thereon. And in that case it appeared that prior to the insolvency the company was indebted to the bank in the sum of nearly $100,000, and that these notes were placed in its hands for collection. The court sustained the title of the bank to the notes, and their proceeds as security for its indebtedness, notwithstanding the assignment. While we may not refer to that case for matters of fact, yet the facts therein disclosed add weight to the conclusion to which, irrespective thereof, we have come, that an assignment in insolvency does not disturb liens created prior thereto expressly or by implication in favor of a creditor. We conclude, therefore, that the demurrer to the second defense was properly sustained. The judgment of the Circuit Court of Appeals is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.